(26,820)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1919.

No. 240.

E. W. BLISS COMPANY, APPELLANT,

vs.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

INDEX.

	Original.	Print.
History of proceedings	1	1
Amended petition	2	1
Appendix A—Agreement between Armstrong *et al.* and E. W. Bliss Company, April 10, 1905	16	9
History of further proceedings	21	12
Order of court on defendants' demurrer	21	12
Substituted demurrer and motion of defendants	22	13
Argument and submission of motion to dismiss	24	14
Opinion of the court, Campbell, C. J.	25	14
Order of court sustaining demurrer	35	24
History of further proceedings	36	25
Judgment of the court	37	25
Claimant's application for and allowance of appeal	37	26
Clerk's certificate	38	26

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., OCTOBER 17, 1919.

1 Court of Claims.

No. 32,838.

E. W. BLISS COMPANY

vs.

THE UNITED STATES.

I. *History of Proceedings.*

On May 29, 1914 the claimant filed its original petition.

On April 12, 1916 the defendants filed a motion to dismiss said petition.

On November 21, 1916 the defendants' motion to dismiss was argued and submitted.

On December 4, 1916 the defendants' motion to dismiss was overruled.

On December 13, 1916 the defendants filed a motion to strike out certain paragraphs of the petition. This motion was, on January 4, 1917, ordered to the Law Calendar.

On February 23, 1917 the defendants' motion of December 13, 1913 was argued and submitted by Mr. W. C. Workman, for the defendants, and by Mr. Arthur C. Fra[illegible] for the claimant, and it was thereupon ordered that claimant file a copy of written
2 instrument under which it claims title to patents named in paragraph 5 of the petition, with leave to amend the petition.

On March 28, 1917 the claimant filed its amended petition, and Appendix A, as follows:

II. *Amended Petition and Appendix A.*

Filed March 28, 1917.

Amended Petition.

To the Honorable the Judges of the Court of Claims.

The petition of the E. W. Bliss Company respectfully shows:

1. That petitioner is a corporation duly incorporated and existing under the laws of West Virginia, having its principal office in the Borough of Brooklyn, City and State of New York.

2. The petitioner is the maker and owner of the Bliss-Leavitt torpedo, which it has made for many years for the United States Government. That defendant, in addition to such purchase of torpedoes from petitioner, has also at various times, purchased torpedoes

of Whitehead & Company, an English corporation, and has also, itself made various parts of torpedoes in the United States.

3 3. That petitioner now, is, and, at all times since the grant and assignment to it of the Letters Patents hereinafter referred to, has been the sole and exclusive owner of the invention and improvements thereof covered by said Letters Patents. That the device or structure embodying said inventions is generally known as, and hereinafter will be designated as a "superheater." That said superheater is a device whereby fuel is burned in the compressed air driving the motor by which the torpedo is propelled, so that the compressed air is heated to a high degree before its energy is utilized, and by means of which its energy is vastly increased.

4. That said superheater invention was covered by Letters Patent of the United States, No. 693,871, duly granted on February 25, 1902, to petitioner, as the assignee of the inventor, Frank M. Leavitt, of Brooklyn, New York, the assignment, dated December 21, 1898, having been duly recorded in the United States Patent Office on January 31, 1902, in Liber D, 64, page 467, of Transfers of Patents, and by Letters Patent of the United States, No. 693,872, duly granted on February 25, 1902, to petitioner, as the assignee of the inventor, Frank M. Leavitt, said assignment, dated January 23, 1902, having been duly recorded in the United States Patent Office January 31, 1902, in Liber D, 64, page 468, of Transfers of Patents.

5. (*a*) That certain improvements in said superheater made by William Hollis Sodeau, of Newcastle-upon-Tyne, England, were acquired by Sir W. G. Armstrong, Whitworth & Company, Ltd. (hereinafter referred to as "Armstrong Company"), of the same place, and set forth in British Specification No. 25,003 of the 17th of November, 1904, and thereafter said Armstrong Company and
4 petitioner did enter into a certain written instrument dated the 10th day of April, 1905, a true copy of which is hereunto annexed, marked "Appendix A."

(*b*) That said instrument was entered into in contemplation of an application for patent in the United States covering the same subject matter, and in due course two such applications for patent were filed and the following Letters Patent granted thereon to said Armstrong Company as the assignee of said William H. Sodeau (assignments thereof having been duly recorded in the United States Patent Office), namely:

No. 827,891, granted August 7, 1906, and
No. 828,432, granted August 14, 1906;

and that said Armstrong Company, upon the grant of said Letters Patent, notified petitioner thereof, and that said Letters Patent were for the same invention set forth in said English Specification No. 25,003 of the 17th of November, 1904.

(*c*) That said patents and each and all of the other subsequent patents hereinafter named, were and are subservient to said patents Nos. 693,871 and 693,872, and could not be used in torpedoes without employing the invention covered by said last-named patents.

(*d*) That the effect of said written instrument was to grant unto petitioner and its assigns the sole and exclusive license and authority to make, use and vend the inventions of said Letters Patent Nos. 827,891 and 828,432 for the whole period of the terms thereof, in the manufacture of apparatus for heating compressed air for the purpose of propelling Bliss-Leavitt torpedoes wherever sold by petitioner, and Whitehead torpedoes sold only to the United States Government.

5 (*e*) That on the dates given below, the following Letters Patent of the United States were duly granted to said Armstrong Company as the assignee of said William H. Sodeau and of said William H. Sodeau and Edward W. Lloyd (assignments thereof having been duly recorded in the United States Patent Office), viz.:

No. 835,262, granted November 6, 1906;
No. 850,307, granted April 16, 1907;
No. 944,975, granted December 28 ,1909;
No. 964,574, granted July 19, 1910;
No. 1,008, 871, granted November 14, 1911, and
No. 1,009,024, granted November 14, 1911.

(*f*) That pursuant to the provisions of Articles 8 and 10 of said written instrument (Appendix A), said Armstrong Company did from time to time communicate to petitioner the subjects-matter contained in and claimed by the several Letters Patent recited in the foregoing sub-paragraph (*e*), and did furnish petitioner with full information, drawings and designs concerning the same; and petitioner did thereafter adopt and incorporate in its Bliss-Leavitt torpedoes constructions of superheaters and appurtenances thereof (known as "outside superheaters" or "Armstrong superheaters") embodying wholly or in part the subjects-matter of said United States patents; and that petitioner upon so doing did notify said Armstrong Company to that effect and that royalties would be payable under said written instrument for such superheaters as sold to the United States; and that subsequently upon making sales of said torpedoes containing said outside superheaters to the United States, petitioner did from time to time (as provided in Articles 4, 5 and 6 of Appendix A) account and pay to said Armstrong Company the royalties
6 named in Article 4 of the said instrument for each and all of the torpedoes sold containing such outside superheaters; and said Armstrong Company did receive and accept and receipt for all of said royalties so paid.

(*g*) That it has been uniformly recognized and understood by and between said Armstrong Company and petitioner that the several United States Letters Patent named in this paragraph 5 are within and covered by said written instrument (Appendix A) as fully and

effectively as if in terms recited therein; and that as respects said Letters Patent petitioner was entitled to and has enjoyed all the exclusive rights set forth in said written instrument; and that petitioner's rights under said written instrument concerning said patented superheaters for torpedoes have been exclusive of all others in so far as concerns Bliss-Leavitt and Whitehead torpedoes within and throughout the United States and for the use of the United States Government; and that the only known or existing torpedoes are said Whitehead and Bliss-Leavitt torpedoes, or others substantially like them, and that no other torpedoes are adopted, purchased, made, or used, by the United States or any other government; that said torpedoes are propelled by stored compressed air or other gas, and it is only to torpedoes so propelled that superheaters are applicable; and that no other torpedoes containing superheaters are known in the art or sold to, or used by, the United States Government; and that the facts herein stated have been true at all times from the date of said instrument (Appendix A) down to the present; and that accordingly, petitioner has solely and exclusively been entitled to, and had and enjoyed, as respects all torpedoes, the protection resulting from the grant of said several Letters Patent and each of them.

7 (h) That from the date of said written instrument (Appendix A), and during the entire period referred to in the present petition and up to the present time, all the terms, conditions and covenants of said written instrument have been fully executed, observed and lived up to, and said instrument has at all times been and is now in full force and effect.

6. That petitioner now is the owner as aforesaid of all the rights and privileges granted and secured or intended to be granted and secured in and by said Letters Patent, and has been such owner since the granting of said respective patents.

7. That the said Frank M. Leavitt was the true, original and first inventor of the said invention and improvements thereon patented in said Letters Patent, Nos. 693,871 and 693,872, that the same were not known or used by others in this country before his invention or discovery thereof, and not patented or described in any printed publication in this or any foreign country before his invention or discovery thereof or more than two years prior to his application for said Letters Patent, Nos. 693,871 and 693,872 or either of them, and had not been in public use or on sale in this country for more than two years prior to his said respective applications, and which had not been abandoned to the public, and for which no application for a patent in a foreign country had been filed by the said Frank M. Leavitt or his legal representatives or assigns more than seven months prior to the filing of said application for said patent No. 693,871, or said application for said patent No. 693,872.

8 8. That the said William H. Sodeau was the true, original and first inventor of the improvements on said superheater

patented in said Letters Patent, Nos. 827,891; 828,432; 835,262; 944,975; 964,574; 1,008,871, and 1,009,024; that the same were not known or used by others in this country before his respective invention or discovery thereof and not patented or described in any printed publication in this or any foreign country before his respective invention or discovery thereof or more than two years prior to his respective applications for said Letters Patents Nos. 827,891; 828,432; 835,262; 944,975; 964,574; 1,008,871, and 1,009,024, and which had not been in public use or on sale in this country for more than two years prior to his said respective applications and which had not been abandoned to the public, and for which no application for a patent in a foreign country had been filed by the said William H. Sodeau or his legal representatives or assigns more than twelve months prior to the respective filing of the applications for said patents Nos. 827,891; 828,432; 835,262; 944,975; 964,574; 1,008,871, and 1,009,024.

8-*a*. That the said William H. Sodeau and Edward W. Lloyd were the true original and joint inventors of the improvements on said superheater patented in said Letters Patent No. 850,307, that the same was not known or used by others in this country before their said invention or discovery thereof and not patented or described in any printed publication in this or any foreign country before their said invention or discovery thereof, or more than two years prior to their application for said Letters Patent No. 850,307, and which have not been in public use or on sale in this country for more than two years prior to their said application and which had not been
9 abandoned to the public, and for which no application for a patent in a foreign country had been filed by the said William H. Sodeau and Edward W. Lloyd, or their legal representatives or assigns, more than twelve months prior to the filing of the application for said patent No. 850,307.

9. That on or about October 18, 1906, the defendant through its Bureau of Ordnance of the Navy Department, in written communications, bearing said date, requested a list of petitioner's patents covering the Bliss-Leavitt torpedo and the amount of royalty which petitioner would charge defendant for the use thereof. That on or about November 24, 1906, petitioner furnished such list in writing which included said superheater patents. That subsequently, and on or about June 14, 1907, defendant by telegraph, requested permission of petitioner to purchase a limited number of torpedoes from Whitehead & Company, an English corporation, containing said superheater inventions. That petitioner on same day replied by telegraph that it desired to render every assistance to the government on a proper business basis. That thereupon, and on or about June 17, 1907, the officers of petitioner conferred with Admiral Mason, Chief of the Bureau of Ordnance, at Washington, and it was agreed between them that the government might purchase not more than 100 torpedoes from Whitehead & Company, the amount of the royalty for the use therein of said superheater inventions to be later settled and

agreed upon by the defendant and petitioner. That subsequently defendant bought of Whitehead & Company, pursuant to said agreement 50 torpedoes containing said superheater inventions,
10 which were, as petitioner is informed and believes, brought into the territory of the United States subsequent to June 1, 1908. That on or about November 9, 1907, defendant, through its said Bureau of Ordnance, by letter bearing said date, stated, "The Bureau desires to take the subject of royalties under consideration for final settlement and requests that the company will submit proposals covering the following points: * * * (*b*) Royalty to be paid by the government for the manufacture of gyro and superheater for installation in Whitehead or other type of torpedo. (*c*) Price to be paid for superheaters and gyros manufactured by the E. W. Bliss Company and installed by the government in Whitehead or other type of torpedoes." That thereupon petitioner replied by letter dated November 25, 1907, "Referring to your letter of November 9th, in regard to royalties on Bliss-Leavitt torpedo, and in confirmation of verbal proposition made by the officers of this company to you at Sag Harbor a few days ago, beg to state that we consider the following royalties and prices to be fair. * * * (3) Royalty to be paid by the government for the manufacture of superheaters for installation in Whitehead or other type of torpedo, five hundred dollars ($500.00). (4) Price to be paid for superheaters manufactured by E. W. Bliss Company and installed by the government in Whitehead or other type of torpedoes, six hundred fifty dollars ($650.00)." That defendant, through its said Bureau, by letter dated November 29, 1907, acknowledged receipt of said letter of November 25, 1907, and stated that the matter would be laid before the Torpedo Board at its meeting on December 3, 1907, and invited petitioner to attend.

That petitioner, by its executive officers, attended said meet-
11 ing and explained the reasonableness of said royalty to the members of the Torpedo Board. That thereafter, and on or about June 4, 1908, by contract bearing said date, the defendant agreed to pay petitioner six hundred fifty dollars ($650.00) each, for twenty superheaters containing said patented inventions and improvements, or some of them. That said contract was duly performed and the price paid. That defendant, on or about December 12, 1910, by letter bearing said date, referred to the superheater royalty specified in petitioner's letter of November 25, 1907, and requested a reduction thereof. That petitioner replied by letters dated December 20, 1910, declining to reduce the amount of said royalty. That thereafter, and on or about April 18, 1911, by contract bearing said date, petitioner agreed to furnish 75 superheaters containing said patented inventions and improvements or some of them to the government at six hundred fifty dollars ($650.00) each. That said contract was duly performed and the contract price paid. That defendant, by letter dated April 27, 1911, requested additional superheaters to replace ones on which the royalty had already been paid, and requested that for this reason, the price for these new superheaters be reduced. That accordingly, on or about June 16, 1911, by contract bearing

said date, petitioner agreed to supply 100 superheaters containing said patented inventions and improvements or some of them at two hundred dollars ($200.00) each. That said contract was duly performed and the purchase price paid. That thereafter, and on or about March 13, 1912, by letter bearing said date, defendant repeated its request of December 20, 1910, for a reduction of the five hundred dollars ($500.00) royalty for superheaters. That petitioner
12 by letter dated March 19, 1912, declined to grant any reduction and no reduction has ever been granted, and petitioner has never consented to the use of said patented inventions or said patented improvements thereon or any of them by defendant without payment of said royalty of five hundred dollars ($500.00) each.

10. That in addition to the 50 torpedoes purchased by defendant from Whitehead & Company, as set forth in the preceding paragraph of this petition, defendant has purchased from the same company other torpedoes containing some or all of said patented superheater inventions and improvements, namely, 130 torpedoes on or about July 7, 1908; 180 torpedoes on or about March 29, 1911; and 50 torpedoes on or about October 25, 1911. That in addition, defendant has made since April 15, 1913, or is engaged in making, 100 superheaters in the United States which contain said patented superheater and said patented improvements thereon or some of them.

10*a*. That subsequently to April 10, 1905, and after the invention and development and practical introduction of said inside or Armstrong superheater, and prior to June 14, 1907, as petitioner is informed and believes, said Armstrong Company licensed said Whitehead & Company to use and exercise the inventions set forth in the patents recited in paragraph 5 of this petition under the corresponding Letters Patent of Great Britain for said inventions respectively, said license having been expressly subject to the rights of petitioner under said instrument of April 10, 1905 (Appendix A); and that subsequent to such license to said Whitehead & Company, and prior to June 14, 1907, and immediately preceding said latter date,
13 said Whitehead & Company (being then in privity with said Armstrong Company concerning the premises) informed the Bureau of Ordnance of the United States Navy Department that they (Whitehead & Company) were not at liberty to sell Whitehead torpedoes to the United States containing the so-called Armstrong superheater without the express permissiion of petitioner, and that such action by Whitehead & Company was taken because they knew that under said instrument (Appendix A) petitioner alone had the right to sell such superheaters to the United States; and that the Chief of the Bureau of Ordnance so informed petitioner on or about June 14, 1907, when (as stated in paragraph 9 of this petition) the defendant requested petitioner's permission to purchase torpedoes from said Whitehead & Company containing said superheater inventions, and that defendant requested such permission from petitioner because de-

fendant well knew of such instrument (Appendix A) and that under its provisions petitioner alone had the right to sell such Armstrong superheaters to the United States.

11. That the fair and reasonable royalty for each of said superheaters is $500.00, which is also the stipulated and agreed royalty as above stated.

12. That petitioner on or about May 2, 1913, and at various other times, has demanded from defendant payment of said royalty of $500 for each of the 510 superheaters referred to in the preceding paragraphs of this petition, but defendant has wholly failed and neglected to pay any part thereof, and, by reason of the premises, the defendant is justly indebted to your petitioner in the sum of two hundred and fifty-five thousand dollars ($255,000), which sum is still due and unpaid.

14 13. That the petitioner is the sole owner of the claim set forth in this petition, no assignment or transfer of the said claim or of any interest therein having ever been made, and that petitioner is justly entitled to the amount herein claimed from the United States after allowing all just credits and off-sets.

14. That no action upon your petitioner's claim has been had by or before Congress or any executive department of the Government, except that petitioner brought the subject of its claim to compensation for the use of said invention by the United States to the attention of the Secretary of the Navy by letter of May 2, 1913, and that thereafter your petitioner was informed by the Assistant Secretary of the Navy that the necessary proceedings for the consideration and adjustment of said claim should be instituted in this Honorable Court.

15. That petitioner is as aforesaid a domestic corporation organized under the laws of West Virginia, and that petitioner has at all times borne true allegiance to the Government of the United States and has not in any way voluntarily aided, abetted or given encouragement to rebellion against the said Government; that neither petitioner nor any assignee of petitioner's has at any time brought or has now pending in any court any suit or process against any other person, firm or corporation acting or professing to act mediately or immediately under the authority of the United States for or in respect of the claim herein presented.

16. That the facts stated in this petition are true.

Whereupon your petitioner asks judgment in its favor against the United States for the said sum of $255,000.00.

15 The petitioner's address is Brooklyn, New York. The address of its attorneys, Bacon & Milans, is 908 G Street, N. W., Washington, D. C.

(Signed) E. W. BLISS COMPANY,
By F. C. B. PAGE,
Vice-President.

L. S. BACON,
Attorney for Claimant.
FRANK H. PLATT,
ARTHUR C. FRASER,
Of Counsel.

EASTERN DISTRICT OF NEW YORK,
City of New York, Borough of Brooklyn, ss:

F. C. B. Page, being duly sworn according to law, says that he is the Vice-President of the E. W. Bliss Company, the petitioner named in the foregoing amended petition; that he has read the said petition and knows the contents thereof, and that the facts stated in the said petition are true to the best of his knowledge, information and belief.

(Signed) F. C. B. PAGE.

Sworn to and subscribed to before me this 27" day of March, 1917,
[NOTARY'S SEAL.] MOSES ARONSON,
Notary Public, #83, Kings Co., N. Y.

16 APPENDIX A.

Agreement, entered into this 10th day of April, 1905, between Sir W. G. Armstrong, Whitworth & Company, Ltd., Elswick Works, Newcastle upon Tyne, hereinafter referred to as the Armstrong Co., of the one part, and the E. W. Bliss Company, of the Borough of Brooklyn, City and State of New York, United States of America, hereinafter referred to as the Bliss Co., of the other part, witnesseth:

1. Whereas the Armstrong Co. are the sole owners of an invention provisionally protected in England by a specification No. 25003 deposited on the 17th day of November, 1904, for "Improvements in or relating to a method and means for increasing the work obtainable from a charge of compressed air more particularly applicable to the propulsion of torpedoes and the like"; and whereas the Armstrong Co. proposes to apply for a patent in the United States of America covering the same subject matter and desires to grant to the Bliss Co. an exclusive license to use the said inventions in connection with the Bliss-Leavitt torpedo manufactured by the Bliss Co. upon the terms and for the purposes hereinafter expressed, and the Bliss Co. desires to acquire such license,

It is agreed as follows:

2. The Armstrong Co. hereby grants unto the Bliss Co. and their assigns the sole and exclusive license and authority to use and exercise the said inventions under the said Letters Patent for the whole period of the term to be granted by the said Letters Patent and any
17 extension of the said term in the manufacture of apparatus for heating compressed air for the purpose of propelling Bliss-Leavitt torpedoes wherever sold by the Bliss Co., and Whitehead torpedoes sold only to the United States Government.

3. All fees, costs and expense of and attending the completing, obtaining, maintenance and protection of any patent and similar rights obtained or to be obtained under these Presents shall be paid and borne by the Armstrong Co.

4. The Bliss Co. shall pay to the Armstrong Co. the sum of Twenty-Five (25) Dollars as royalty for each torpedo fitted with apparatus manufactured under the said patents, or any extension thereof.

5. The royalties shall be paid on the first days of January and July in every year.

6. The Bliss Co. shall keep proper accounts of all apparatus made by them under this license, and will at the end of every half year furnish to the Armstrong Co. full particulars thereof and of the royalty payable therefor; and will, if required, verify same by statutory declaration; and will also, if and when required, permit the Armstrong Co. to inspect the apparatus in course of manufacture.

7. If default be made in payment of any royalty when the same becomes due, or if there shall be any breach of this agreement, and such default or breach shall continue for three months after notice in writing from the Armstrong Co. requiring default or breach to be made good, then, and in either of such cases, the Armstrong
18 Co. may, by notice in writing given to the Bliss Co., or left at their registered office, declare this license to be void, and the same shall be void accordingly.

8. The Armstrong Co. shall from time to time, upon demand, give to the Bliss Co. free of charge full information, drawings and designs showing the latest method of applying their said patented invention or any improvements therein to anything allowed to be done under or in pursuance of this license.

9. The Armstrong Co. shall not at any time during the continuance of this license use or exercise the said invention, or any such future improvement or improvements as hereinafter mentioned; or grant any license to any other person or persons whomsoever to use or exercise the same, or any such improvement or improvements, for the purpose of propelling Bliss-Leavitt torpedoes, or Whitehead tor-

pedoes, so far as such Whitehead torpedoes may be intended for sale to the United States Government.

10. If during the continuance of this license the Armstrong Co. shall make or discover any improvement or addition to the said invention or the use of the same, or which can or may be employed for the same purpose as the said invention, or shall become owners of any such improvement or additio nor substitute, then, and in every such case, and whether such improvement or addition should be the subject of Letters Patent or not, they will forthwith communicate the same to the Bliss Co., who shall be entitled to use and practice such improvement or addition during the continuance of the
19 license hereby granted without paying any further royalty or consideration in respect thereof.

11. In case the said Letters Patent, or any extension or renewal thereof, shall be infringed so far as regards the license to use the same as hereby granted, the Armstrong Co. shall forthwith, after notice of such infringement, at their own cost, take all necessary proceedings for effectually protecting and defending the same; and in default of their so doing the Bliss Co. shall be at full liberty, by notice in writing given or left at their usual or last known place of business, to determine this agreement.

12. If the Armstrong Co. shall in their application for the United States Patent describe the said invention as an improvement in the method and apparatus specified in the United States Patents Nos. 693,871 and 693,872, both dated the 25th of February, 1902, and granted to Frank M. Leavitt, then the Bliss Co. shall not either directly or indirectly oppose or in any way hinder the granting of such Letters Patent to the Armstrong Co.

13. If any difficulty or dispute shall arise between the Armstrong Co. and the Bliss Co. touching or concerning the construction of these Presents, or any clause or matter herein contained, or the rights, duties or liabilities of either party hereunto, then, and in every such case, the dispute or difference shall be referred to a single arbitrator to be agreed upon between them; and in case of the neglect, refusal or inability of the said parties to agree upon a single arbitrator, then to an arbitrator to be appointed by the President for the time being of the Institute of Civil Engineers.

20 In witness whereof, the parties hereto have hereunto caused their respective common seals and signatures to be affixed the day and year first above written.

E. W. BLISS COMPANY.
W. A. PORTER,
Vice-President.

Attest:

H. C. SEAMAN,
[SEAL.] *Secretary.*
A. M. W.
S. W. SALHUE,
[SEAL.] *Director.*
A. H. COCHRANE,
Secretary.

21 III. *History of Further Proceedings.*

On April 7, 1917 the defendants filed a demurrer and motion to strike out certain paragraphs of the amended petition.

On May 23, 1917 the defendants' motion of April 7, 1917 was argued and submitted by Mr. H. C. Workman, for the defendants, and by Mr. Arthur C. Fraser, for the claimant.

IV. *Order of Court on Defendants' Demurrer and Motion of April 7, 1917.*

Entered May 28, 1917.

It is ordered by the court that this case be and the same is hereby remanded to the Law Calendar. (See Memorandum.)

Memorandum.

The motion herein by the defendants and their demurrer appear to be addressed to parts of the petition, and their brief makes it appear as though there were a demurrer to the whole petition as amended. If it is the purpose of the Government to demur to the petition as amended the case is remanded to enable them to make their position in that regard clear in their pleading.

By THE COURT.

22 V. *Substituted Demurrer and Motion* (1) *to Dismiss Said Amended Petition, or* (2) *to Strike Out Certain Paragraphs.*

Filed June 2, 1917.

Demurrer and Motion.

Now comes defendant, by its Attorney General, and demurs to the amended petition filed April 3, 1917, and for grounds of demurrer says:

1. That the facts and things alleged in said petition do not make or constitute any cause of action against defendant nor any cause of action of which this court has jurisdiction.

As a separate ground of demurrer defendant further says:

2. That the paragraphs of said petition numbered 5 (*a*), (*b*), (*c*), (*d*), (*e*), (*f*), (*g*), (*h*), 6, 8, 8-*a*, and 10-*a*, and the written instrument, "Appendix A," specified in said paragraphs, do not show any title or ownership in plaintiff in or to the eight letters patent, or any of them, specified in said paragraphs, nor any such title or ownership therein as can give plaintiff any right to sue for or recover from defendant any royalties, damages, or compensation for defendant's alleged use of the inventions of said letters patent or any of them.

23 As a separate ground of demurrer defendant further says:

3. That paragraphs (*b*), (*c*), (*d*), (*e*), (*f*), and (*g*) of said petition are wholly conclusions of law in that it requires adjudication of the court and judicial interpretation of the respective letters patent to determine: (1) Whether or not the two letters patent specified in paragraph (*b*) are, as alleged, for the same invention as set forth in English Specification No. 25003, of November 17, 1907; and also (2) whether or not the two patents specified in paragraph (*b*) "and each and all of the other subsequent patents hereinafter named were or are subservient to patents Nos. 693871 and 693872," etc., as alleged in paragraph (*c*) and (3) whether or not "the several United States Letters Patent named in this paragraph 5," including the six named in paragraph (-) "are within and covered by said written instrument (Appendix A)," etc., as alleged in paragraph (*g*).

As a separate ground of demurrer defendant says:

4. That paragraph 2 of said petition is irrelevant and immaterial to any of the matters and things alleged or set forth in the petition as supporting any right in plaintiff or any complaint against defendant.

Wherefore defendant moves the court: (1) To dismiss said petition, or, (2) to strike out of said petition paragraphs numbered 2,

5 (*a*), (*b*), (*c*), (*d*), (*e*), (*f*), (*g*), (*h*), (6), 8, 8*a*, and 10*a*.

24 And defendant further moves the court for an order substituting the foregoing demurrer and motion in the place of defendant's demurrer and motion to strike out filed April 7, 1917, the briefs heretofore filed by defendant to stand as the briefs and argument upon this demurrer and motion; and for such other and further action as the court may deem just and proper in the premises.

HUSTON THOMPSON,
Assistant Attorney General.
H. C. WORKMAN,
Attorney.

VI. *Argument and Submission of Above Motion.*

On October 29, 1917 the defendants' demurrer to, and motion to strike out certain paragraphs of amended petition was argued and submitted by Mr. H. C. Workman, for the defendants, counsel for claimant not being present.

25 VII. *Opinion of the Court by Campbell, Ch. J., in Which all the Judges Concur.*

Entered December 3, 1917.

CAMPBELL, *Chief Justice*, delivered the opinion of the court:

The plaintiff, E. W. Bliss Company, brought its action against the United States to recover several sums aggregating $255,000, claimed to be due as "royalties" upon certain patented inventions or compensation for their use by the United States. The defendants have demurred to the amended petition, and have moved to strike separate portions of the same.

The objections presented are (1) that the amended petition does not show a contract between plaintiff and defendant, (2) that it seeks a recovery of damages sounding in tort, or (3) that the case is one of infringement and plaintiff is a mere licensee of the described patents.

Prior to the act of June 25, 1910, 36 Stat., 851, the Court of Claims had jurisdiction in cases involving patents where the claim was based upon express or implied contract and had no jurisdiction in cases claiming compensation for infringement. That act materially enlarged the court's jurisdiction where the alleged infringement was subsequent to the passage of the act. Certain limitations appear in the act which are not material in the present case.

It is important to observe the distinction between actions for the recovery of royalties or sums claimed to be due for the use by the United States under contract, express or implied, and actions for infringement. There are defenses which are open to the Government when charged with infringement which can not be urged when the

action is upon express contract. In the former class the validity of the patent, or whether the patented device exhibits novelty, may be a vital question, whereas in an action upon an express contract no such question is involved.

The court's jurisdiction in matters of contract is defined by section 145 of the Judicial Code. It has no jurisdiction of damages in cases "sounding in tort." It has been definitely settled that the statute inhibits jurisdiction in the court of that class, sometimes called quasi contracts, which involve tort or a breach of a mere duty
26 growing out of the relation of the parties as distinguished from a breach of contract made between them, and which in some jurisdictions are enforceable in actions ex contractu. Where the claim arises out of tort it is not permissible for the plaintiff to waive the tort and sue in assumpsit in this court. These questions have been settled by decisions of the Supreme Court.

In Russell v. United States, 182 U. S., 516, an action had been brought upon an alleged implied contract to pay for the use of a patented invention, and it was held under the facts found that no contract could be implied, and that if petitioners had suffered any injury it had been through the infringement of their patent, not by a breach of contract. "For the redress of an infringement the Court of Claims has no jurisdiction." That case was decided prior to the said act of June 25, 1910. It was said in Russell's case:

"This court has held that under the act of March 3, 1887 (brought forward as section 145 of the Judicial Code), defining claims of which the Court of Claims had jurisdiction, the court had no jurisdiction of demands against the United States founded on torts. Schillinger v. United States, 155 U. S., 163; United States v. Berdan Fire-Arms Co., 156 U. S., 552. In other words, to give the Court of Claims jurisdiction, the demand sued on must be founded on a convention between the parties—'a coming together of minds.'" A reason for the distinction between the rights of the Government and of an individual defendant when sued upon an alleged implied contract is stated to be that "it is the prerogative of a sovereign not to be sued at all without its consent or upon such causes of action as it chooses. It has not chosen to be sued in actions sounding in tort. This court has declared as we have seen." Op., p. 533.

It was said in Harley's case, 198 U. S., 229, 234:

"We held in Russell v. United States, 182 U. S., 516, 530, that in order to give the Court of Claims jurisdiction under the act of March 3, 1887, 24 Stat., 505, ch. 359, defining claims of which the Court of Claims had jurisdiction, the demand sued on must be founded on 'a convention between the parties' — 'a coming together of minds.' And we excluded as not meeting this condition those contracts or obligations that the law is said to imply from a tort. Schillinger v. United States, 155 U. S., 163; United States v. Berdan Fire-Arms Mfg. Co., 156 U. S., 552."

To the same effect is Juragua Iron Co. v. United States, 212 U. S., 297, 309. The cases are reviewed in Gigby's case, 188 U. S., 400, where the petitioner sought to fix a liability upon the Government for personal injuries sustained by the petitioner in an elevator owned by the Government and operated by one of its employees. The theory advanced to sustain the action was that of an implied contract. The court held that the action was necessarily one sounding in tort, and that there was no contract, express or implied, growing out of the facts which could be made the basis for jurisdiction under the Tucker Act of March 3, 1887. It was said by the court, p. 409:

"A party may in some cases waive a tort; that is, he may forbear to sue in tort and sue in contract, where the matter out of which his claim arises has in it the elements both of contract and tort. But it has been well said that 'a right of action in contract can not be created by waiving a tort, and the duty to pay damages for a tort does
27 not imply a promise to pay them upon which assumpsit can be maintained.' Cooper v. Cooper, 147 Mass., 370, 373."

The above citations make it clear that it is not every use by the Government of a patented invention that gives rise to an action upon an implied contract to pay for such use. It is only when the facts alleged establish an express or implied contract to pay for such use that the petition is cognizable in this court, aside from the act of 1910. Farnham case, 240 U. S., 537, 540.

As above suggested, the act of June 25, 1910, 36 Stat., 851, confers jurisdiction on this court in certain cases of infringement. It may be that the court's jurisdiction has been further enlarged by later acts of Congress which are not material in this suit.

The purpose of the act of 1910 was to provide a forum where the Government could be sued for infringement by parties bringing themselves within the provisions of the act, "and the nature and character of the defenses which the statute prescribes may be made by the United States to such an action when brought." Crozier v. Krupp, 224 U. S., 290, 305. The act prescribes that the Government when sued "may avail itself of any and all defenses, general or special, which might be pleaded by a defendant in an action for infringement as set forth in Title 60 of the Revised Statutes or otherwise." The act by no means obliterates the distinction between actions based upon contract, express or implied, and actions for infringement. It may accentuate the difference by a recognition thereof inherent in the purpose of the act to afford a measure of relief to owners of patented inventions which they could not obtain prior to the passage of the said act. Crozier v. Krupp, supra.

The act of June 25, 1910, provides that whenever an invention described in and covered by a patent of the United States shall hereafter be used by the United States "without license of the owner thereof or lawful right to use the same," such "owner" may recover reasonable compensation for such use by suit in the Court of Claims with certain limitations, not material here, contained in the act. It is

well settled that a mere licensee can not sue for an infringement of a patent.

In Waterman v. Mackenzie, 138 U. S., 252, it is said:

"Every patent issued under the laws of the United States for an invention or discovery contains 'a grant to the patentee, his heirs and assigns, for the term of seventeen years, of the exclusive right to make, use, and vend the invention or discovery throughout the United States and the Territories thereof.' Rev. Stat. §4884. The monopoly thus granted is one entire thing, and can not be divided into parts, except as authorized by those laws. The patentee or his assigns may, by instrument in writing, assign, grant, and convey, either, 1st, the whole patent, comprising the exclusive right to make, use, and vend the invention throughout the United States; or, 2d, an undivided part or share of that exclusive right; or, 3d, the exclusive right under the patent within and throughout a specified part of the United States. Rev. Stat., §4898. A transfer of either of these three kinds of interests is an assignment, properly speaking, and vests in the assignee a title in so much of the patent itself, with a right to sue infringers; in the second case, jointly with the assignor; in the first and third cases, in the name of the assignee alone.
28 Any assignment or transfer, short of one of these, is a mere license, giving the licensee no title in the patent, and no right to sue at law in his own name for an infringement. Rev. Stat., §4919; Gayler v. Wilder, 10 How., 477, 494, 495; Moore v. Marsh, 7 Wall., 515. In equity, as at law, when the transfer amounts to a license only, the title remains in the owner of the patent; and suit must be brought in his name, and never in the name of the licensee alone, unless that is necessary to prevent an absolute failure of justice, as where the patentee is the infringer and can not sue himself. Any rights of the licensee must be enforced through or in the name of the owner of the patent and perhaps, if necessary, to protect the rights of all parties joining the licensee with him as a plaintiff. Rev. Stat., §4921. Littlefield v. Perry, 21 Wall., 205, 223; Paper Bag cases, 105 U. S., 766, 771; Birdsell v. Shaliol, 112 U. S., 485-487. And see Renard v. Levinstein, 2 Hem. & Mil., 628."

The language of section 4919 of the Revised Statutes authorizes suit for infringement "in the name of the party interested, either as patentee, assignee, or grantee." The act of 1910 authorizes suit by the "owner." It becomes necessary, therefore, to determine whether the plaintiff in this suit had such title as "owner" as would authorize a suit for infringement against the United States.

The several transactions alleged in the petition upon which the liability of the Government is rested may be grouped into three classes: (1) An alleged purchase by the Government of 50 Whitehead torpedoes containing the "superheaters" covered by the Armstrong patents, (2) the purchase by the Government at three different times in 1908 and 1911 from Whitehead & Company of Whitehead torpedoes containing the said superheaters to the number of 360, and

(3) the making by the Government of an additional 100 of said superheaters. We speak of the allegation as referring to the "superheaters" for brevity, and do not overlook the fact that the averment is that the Government purchased torpedoes, or has made or is making superheaters which contain the patented superheaters and patented improvements thereon or "some of them." In the view we take of the case, it is not necessary that we examine the sufficiency of the allegations in their designation of what was purchased or made by the Government. We shall assume that the plaintiff intends to claim that the Government is liable in contract or for infringement because of its purchase or manufacture or use of the device covered by the Armstrong patents or the improvements thereon, and for brevity we call the device "superheaters."

By the exhibit to the amended petition, "Appendix A," the plaintiff shows what his interest is. The averments of the petition must be read in the light of said exhibit which purports to be an agreement made on the 10th day of April, 1905, between the Armstrong Company and the plaintiff. It recites that the Armstrong Company owns an invention under an English patent for "improvements in or relating to the method and means for increasing the work obtainable from a charge of compressed air more particularly applicable to the propulsion of torpedoes and the like"; that the Armstrong Company was proposing to apply for a patent in the United States covering the same subject matter "and desires to grant to the Bliss Company an exclusive license to use the said invention in connection with the Bliss-Leavitt torpedo manufactured by the Bliss Company
29 upon the terms and for the purposes hereinafter expressed, and the Bliss Company desires to acquire such license." The agreement proceeds to grant to the Bliss Company and their assigns "the sole and exclusive license and authority to use and exercise the said inventions under the said letters patent for the whole period of the term to be granted by the said letters patent, and any extension of the said term in the manufacture of apparatus for heating compressed air for the purpose of propelling Bliss-Leavitt torpedoes wherever sold by the Bliss Company "and Whitehead torpedoes sold only to the United States Government."

Whether the transfer mentioned is an assignment or a license does not depend upon the name by which it is called, but upon the legal effect of the contract. Waterman v. Mackenzie, supra. The petition shows that the E. W. Bliss Company was the maker and owner of the Bliss-Leavitt torpedo and it is apparent that an important element in the consideration to the Armstrong Company for granting said rights was the concession that the Bliss Company would not "either directly or indirectly oppose or in any way hinder the granting" of letters patent to the Armstrong Company in the event the Armstrong Company, in their application for a United States patent, should describe the invention as an improvement in the method and apparatus specified in United States patents theretofore granted to Frank M. Leavitt. A further consideration was that the Bliss Company would pay $25.00 as royalty for each torpedo fitted with the

apparatus manufactured under said patents. There is a provision in paragraph nine of the agreement that the Armstrong Company "shall not at any time during the continuance of this license use or exercise the said invention * * * or grant any license to any other person or persons whomsoever to use or exercise the same * * * for the purpose of propelling Bliss-Leavitt torpedoes or Whitehead torpedoes so far as such Whitehead torpedoes may be intended for sale to the United States Government."

It appears from the amended petition that Whitehead & Company is a foreign corporation, from whom the defendant has at various times purchased torpedoes. It does not appear that Armstrong & Company had any interest in Whitehead & Company or in torpedoes made by that company. It is averred that the defendant purchased from Whitehead & Company 130 torpedoes on or about June 7, 1908, 180 torpedoes on or about March 29, 1911, and 50 torpedoes on or about October 25, 1911, all of which torpedoes, it is averred, contained the "patent superheater inventions and improvements." These are referred to in the amended petition and will be by us referred to as superheaters. It is also averred that in addition to said purchases from Whitehead & Company the defendant has made since April 15, 1913, "100 superheaters in the United States" which contain said patented superheater and certain patented improvements thereon, "or some of them," mentioned in the amended petition.

It is further averred that the Armstrong Company licensed Whitehead & Company "to use and exercise the said inventions" under the English patents, "said license having been expressly subject to the rights of petitioner under" said Exhibit "A," and that Whitehead & Company informed the Bureau of Ordnance of the United States Navy that they were not at liberty to sell Whitehead torpedoes to the United States containing the so-called Armstrong superheater without the express permission of Bliss & Company.

The amended petition avers that the plaintiff "now is the owner as aforesaid of all the rights and privileges granted, or intended to be granted, and secured in and by said letters patent, and has been such owner since the granting of said respective patents," referring thereby to said superheater patents and to certain other patents mentioned in the amended petition and designated as the Sodeau inventions. The averment of ownership must be treated as a conclusion of the pleader inasmuch as the question of ownership must be determined from the written agreement attached to the petition. While the agreement grants in terms a license "to use and exercise" the inventions, it is averred in the petition that the effect of the written instrument was to grant the sole and exclusive license and authority "to make, use, and vend" the said inventions, and it was explained in argument that "use and exercise" is an expression in the English patent conveyancing that has the same meaning as "make, use, and vend" have in American patent law.

Except for the purposes of the demurrer and motion in this case we express no opinion as to whether the construction of said words given them by plaintiff is correct when the rights of third parties are

involved. London Assurance Co. v. Companhia, etc., 167 U. S., 149, 160; Scudder v. Union National Bank, 91 U. S., 406; Liverpool Co. v. Phœnix Insurance Co., 129 U. S., 397, 446, 453. But assuming that the plaintiff's construction is correct, the question before us is whether the right granted by the Armstrong Company to the Bliss Company of the sole and exclusive license and authority to make, use, and vend superheaters and other improvements in connection with Whitehead torpedoes "sold only to the United States Government" amounts to such a transfer of ownership as will sustain an action by the Bliss Company under the act of 1910.

For the purposes of this suit it must be conceded that the Whitehead torpedoes were not made in the United States. It is averred that those which were purchased were acquired from a foreign corporation, namely, Whitehead & Company. It is apparent that the whole patent was not assigned, and that an undivided part or share was not assigned, and referring to the rules announced in Waterman v. Mackenzie, supra, does the grant amount to an exclusive right under the patent within and throughout a specified part of the United States? We think not. While the right to use the superheaters in the Bliss-Leavitt torpedoes, the patents to which belonged to the Bliss Company, is granted, the grant, so far as any other torpedoes are concerned, is limited to Whitehead torpedoes "sold only to the United States Government." The right of the Armstrong Company to sell its superheaters to any other company, foreign or domestic, which should manufacture torpedoes, except Whitehead & Company, is by the agreement manifestly reserved to the Armstrong Company. Any person having the right to make torpedoes could purchase superheaters from Armstrong & Company for use therein and could sell them anywhere to any person or government and to the United States Government, except only by the terms of the agreement the Whitehead torpedoes and the Bliss-Leavitt torpedoes. There is nothing in the agreement which restricts the manufacture in the United States of the superheaters by the Armstrong Company
31 or its assignees. That company can make them or authorize them to be made at one or more factories or plants in the United States and can sell them or authorize them to be sold in the United States to any other Government in the world than the United States Government, except in connection with Bliss-Leavitt or Whitehead torpedoes. Any party having the lawful right to make torpedoes can be authorized by the Armstrong Company to make, use, or vend the superheaters in the United States, and to dispose of the same in connection with other torpedoes than the Bliss-Leavitt or Whitehead to any person or Government. The sole limitation upon the right of the Armstrong Company in said regard is that it will not authorize any other party than plaintiff to make, use, and vend the superheaters in connection with Whitehead torpedoes sold to the United States Government. The stipulation in the contract is analogous to a covenant not to sue the Bliss Company for infringement if it make, use, and vend the superheaters in connection with its own torpedo or in connection with the Whitehead torpedo when

the latter is sold only to the United States Government. There is no territorial limitation upon the making of torpedoes or the making or using or vending of superheaters.

While the patentee may assign his exclusive right within and throughout a specified part of the United States, and upon such an assignment the assignee may sue in his own name for an infringement of his rights, yet in order to enable him to sue the assignment must undoubtedly convey to him the entire and unqualified monopoly which the patentee held in the territory specified, excluding the patentee himself as well as others. Any assignment short of this is a mere license. Gaylor v. Wilder, 10 How. 477, 494. The grant to Bliss & Company was a mere license. This conclusion is fortified by the provision in the agreement that in case the letters patent "shall be infringed so far as regards the license to use the same as hereby granted" the Armstrong Company would take all necessary proceedings for protecting and defending the same, and in default in their doing so the Bliss Company could determine the agreement. A further provision is that the Bliss Company will pay royalties of $25 to the Armstrong Company. The instrument, therefore, contemplated a license and not an undivided part or share in an exclusive right nor an exclusive right within a specified part of the United States. Waterman v. Mackenzie, 138 U. S., 252; Walker on Patents, 296; Gamewell v. Brooklyn, 14 Fed., 225; Jaros v. Fleece, 60 Fed., 623.

It follows that being a mere licensee the plaintiff can not sue for infringement, and it is manifest that the claim on account of the manufacture by the United States of 100 superheaters "which contain said patented superheater and said patented improvements or some of them" is a claim for infringement.

The claim for the 360 torpedoes "containing some or all of said superheater inventions and improvements" is not based upon contract, express or implied. The allegations of the amended petition fall far short of showing any contract between the plaintiff and the United States with reference to them. It is specifically alleged in the ninth paragraph that "petitioner has never consented to the use of the said patented inventions or said patented improvements thereon, or any of them, by defendants without payment of
32 said royalty of $500." If that averment be confined to the 50 Whitehead torpedoes mentioned in said paragraph, it is yet plain that the plaintiff fails to show that any contract was made or can be implied with reference to said 360 torpedoes or superheaters. It is not averred that defendants purchased them with plaintiff's consent or permission. The exact contrary is to be inferred. The defendants dealt with Whitehead & Co., not in recognition of any rights of the plaintiff but in antagonism to and disregard of them. "There was no point in the whole transaction, from its commencement to its close, where the minds of the parties met or where there was anything in the semblance of an agreement." Schillinger case, 155 U. S., 163, 170. "And the use of the device can not give a right independent of the understanding under which it was used."

Harley case, 198 U. S., 229, 234. A claim for compensation for an authorized use is not a claim for an infringement. The two things are totally distinct. Russell case, 182 U. S., 516, 531. Where the facts alleged show an unauthorized use and a disregard of plaintiff's claims there may be an infringement, but no contract can be implied therefrom. Any right which the plaintiff had was such as its contract with the owner of the patents gave it, and that, as we have seen, was a mere license. No right in the patents themselves passed thereby. The plaintiff was not the "owner" of the patents in the sense that that term is used in the act of 1910. The Government therefore did not use any patent belonging to plaintiff. It refused to acknowledge a right in the plaintiff to fix a price at which the torpedoes and superheaters combined could be purchased, and proceeded to buy them from a party who had the right to sell the torpedoes, and who, according to the averments of the petition, also had the right to sell the superheaters to other governments than the United States. If there was any element of tort in the transaction, that fact can not be made the basis of an action ex contractu. The plaintiff being a mere licensee and not the owner of the patents, can not sue for infringement or maintain its action on account of the said 360 superheaters.

An additional reason (applicable at least to the 50 superheaters mentioned in section 9 of the amended petition and the 130 superheaters alleged to have been purchased in 1908) for holding that plaintiff can not sustain a claim on account of the use of these superheaters by the Government is found in the fact that the act of 1910 does not authorize a recovery of compensation based on the use by the United States of any article "used by or in the possession of the United States" prior to the enactment of the statute.

As to said 50 superheaters purchased from Whitehead & Company, the plaintiff apparently seeks to recover upon contract. The defendants by their demurrer challenge the sufficiency of the petition in its allegations as to the agreement upon which plaintiff apparently relies, namely, an agreement between plaintiff and the Chief of the Bureau of Ordnance made in June 1907. Construing the pleading more strongly against the pleader, it is manifest that the averments relating to the matter of contract are not as definite as they could be made if, in fact, the suggested agreement was entered into. If Whitehead & Company informed the defendants that it could not sell the superheaters in connection with the Whitehead torpedoes
33 without the express permission of plaintiff because of the license held by plaintiff, and thereupon the defendants' officers applied to the plaintiff for such permission to buy the superheaters from Whitehead & Company, and assuming as valid plaintiff's claim under Appendix "A," and as a condition upon which the purchase would be made, the plaintiff and the defendants' officers agreed that a limited number of Whitehead torpedoes, with the superheater attached, would be purchased from Whitehead & Company, and the Government would pay plaintiff a royalty on the same, the granting of the permission to the Government to make the purchase would

furnish a sufficient consideration to sustain the promise of the Government to pay the stated royalty. Hendrick v. Lindsay, 93 U. S., 143, 148.

If plaintiff had no lawful right to grant a permit to Whitehead & Company to sell the invention to the Government, or if there were any misrepresentation of fact, a different question would arise. While, if inference be allowed, it may be inferred that plaintiff means to allege that permission was granted upon the condition mentioned to purchase superheaters, the allegation as framed is that the Government "might" purchase not more than "100 torpedoes" from Whitehead & Company, the amount of the royalty for the use therein of said superheating inventions to be later settled and agreed upon by the defendant and petitioner, thus failing to specifically aver a permission to buy the superheaters as well as the torpedoes. Of course, it was not necessary for plaintiff to consent to the purchase of Whitehead torpedoes. The concluding averment in paragraph 9 of the amended petition, to the effect that petitioner "has never consented to the use" of said inventions by defendants without the payment of a royalty of $500 each, appears inconsistent with the allegation that an amount was to be later agreed upon.

We express no opinion at this time as to the right of plaintiff to recover compensation if the fact be that plaintiff and defendants' officer agreed that the amount of royalty to be paid plaintiff would be agreed upon later. It is manifest from the allegations that plaintiff did not sell the superheaters and that it authorized the Government to buy and Whitehead & Company to sell them. In acquiring them under such a permit, the Government got no property belonging to plaintiff. It got a permit to purchase property from another. As to whether the plaintiff can have the court fix the compensation under such circumstances, and in view of plaintiff's license agreement, when it was agreed that the compensation (in the shape of royalty) would be later agreed upon by the parties themselves and they have not so agreed, is a question that is left open.

As under a phase of the case mentioned below the plaintiff will be required to make more specific and definite its averment relative to the said purchase, the court withholds any ruling upon the demurrer upon the contract phase of the case referring to the 50 superheaters and will afford the plaintiff an opportunity to amend and state more definitely, as it may be advised, the terms of any contract relied upon and relating to said 50 superheaters.

Another question presents itself, however, and that is one of limitation. The statute of limitations is jurisdictional in this court and need not be specially pleaded. (Wardwell case, 172 U. S.,
34 52.) It is manifest that the allegation that the 50 torpedoes and superheaters were brought into the territory of the United States "subsequent to June 1, 1908," does not fix the date of their purchase under the agreement mentioned. The agreement itself was "on or about June 17, 1907," and in November, 1907, there was correspondence between the parties wherein the bureau desired "to take the subject of royalties under consideration for final settlement."

If this correspondence had no reference to the royalties on the 50 superheaters theretofore authorized to be bought, the petition at least fails to negative such a conclusion. With much particularity the petition sets forth a number of purchases by the Government of Bliss Leavitt torpedoes with superheaters at divers times and payment therefor, the first purchase being under contract of June 4, 1908. But the claim here is for superheaters in Whitehead torpedoes. Construing the pleading more strongly against the pleader, as we might because of its vagueness be justified in doing, the conclusion could be reached that the purchase of the 50 superheaters in question occurred long before June 1, 1908, notwithstanding the indefinite date upon which they were "brought into the territory of the United States." Suit was instituted in this court by the original petition filed May 29, 1914, and therefore only a few days prevents the bar of the statute if it commenced to run on June 1, 1908. It did commence to run when the claim first accrued, and "a claim first accrues, within the meaning of the statute, when a suit may first be brought upon it, and from that day the six years' limitation begins to run." Rice case, 122 U. S., 611, 617.

Section 165 of the Judicial Code provides that where it appears to the court in any case that the facts set forth in the petition do not furnish any ground for relief, it shall not authorize the taking of any testimony therein. In view of this statute, as well as of what has been said about the vagueness of the petition, we think the proper course is to require the plaintiff to make more specific the allegations relative to the alleged agreement and date of purchase of the 50 superheaters instead of construing the averments as we have indicated could be done. This course is justified by the fact that if the claim is really barred the parties should not be subjected to the expense and delay frequently incident to patent litigation.

An order will be entered sustaining defendants' demurrer and motion to strike as to all items of claim for compensation set up in the amended petition except the claim involved in the purchase of 50 Whitehead torpedoes containing superheaters. As to the latter claim, the plaintiff will be required to make its petition more specific.

Hay, Judge; Downey, Judge; Barney, Judge; and Booth, Judge, concur.

35 VIII. *Order of Court Entered December* 3, 1917.

This cause was submitted to the court upon the amended petition and the demurrer thereto by the defendants, and the defendants' motion to strike certain portions of the amended petition, and the same has been duly considered by the court.

It is therefore adjudged and ordered by the court that the defendants' demurrer and motion to strike be sustained so far as concerns the several items of claim designated in the amended petition as 130 torpedoes purchased by the Government on or about July 7, 1908, and 180 torpedoes on or about March 29, 1911, and 50 tor-

pedoes on or about October 25, 1911, all of which are alleged to have some or all of the patented superheater inventions and improvements mentioned in the petition and the 100 superheaters alleged to have been made by defendant since April 15, 1913, making in the aggregate 460 superheaters mentioned in paragraph 10 of the amended petition; that as to all of the said claims for the said 460 superheaters or any of the improvements thereon, no evidence is allowed to be taken in this case.

It is further ordered that as to 50 superheaters alleged to have been purchased from Whitehead & Company in connection with Whitehead torpedoes, and mentioned in paragraph 9 of the amended petition, the claimant is authorized to amend its petition as it may be advised so far as concerns the said 50 torpedoes and superheaters, and the claimant is directed to make more specific and definite its allegations as to the time of the purchase by the Government of the said 50 superheaters.

Said additional allegations and any proposed amendment herein authorized shall be made and filed in this court on or before the 15th day of January, 1918.

All other questions are reserved.

By THE COURT.

36 IX. *History of Further Proceedings.*

On February 18, 1918 the claimant filed a motion to substitute Arthur C. Fraser as attorney of record in place of L. S. Bacon, deceased. On June 3, 1918 this motion was allowed without prejudice to any lien or interest of the former attorney.

On February 18, 1918 the claimant filed a motion for leave to file second amended petition.

On June 3, 1918 the claimant filed a motion for leave to file petition for rehearing.

On June 17, 1918 the court overruled the motion for leave to file second amended petition, and on the same day (June 17, 1918) handed down the following order on the motion for leave to file petition for rehearing:

It appearing that the within motion and argument thereon deal with a proposed amended petition which has not been filed, and no sufficient reason being given for not applying for a rehearing within the time fixed by the rules of the court, the within motion for leave to file a motion for a rehearing is overruled.

June 17, 1918.

By THE COURT.

37 X. *Judgment of the Court.*

At a Court of Claims held in the City of Washington on the Seventeenth day of June, A. D. 1918, judgment was ordered to be entered as follows:

In this case it is ordered that claimant's motion for leave to file motion for rehearing and claimant's motion for leave to file second amended petition be and the same hereby are overruled. And it is further ordered that plaintiff not having complied with the order of the court of December 3, 1917, to make the petition more specific as to certain items of the claim therein mentioned and referred to in the opinion of the court, the petition be and it hereby is dismissed under Rule 18 of the court.

By THE COURT.

IX. *Claimant's Application for and Allowance of Appeal.*

Now comes E. W. Bliss Company, plaintiff by Arthur C. Fraser, its attorney, and feeling itself aggrieved by the final order of this Court, dismissing plaintiff's petition, entered on the 17th day of June, 1918, hereby makes application for and gives notice of appeal to the Supreme Court of the United States.

Dated New York City, N. Y., September 4, 1918.

E. W. BLISS COMPANY,
Plaintiff-Appellant,
By Its Attorney, ARTHUR C. FRASER.

Filed September 5, 1918.

Ordered: That the above appeal be allowed as prayed for.

EDW. K. CAMPBELL,
Chief Justice.

Oct. 21, 1918.

38 Court of Claims.

No. 32838.

E. W. BLISS COMPANY

vs.

THE UNITED STATES.

I, Sam'l A. Putnam, Chief Clerk Court of Claims, certify that the foregoing are true transcripts of the pleadings in the above-entitled cause; of the orders and opinion entered by the court; of the judgment of the court; of the application of claimant for, and the allowance of, an appeal to the Supreme Court of the United States.

In testimony whereof I have hereunto set my hand and affixed the seal of said Court at Washington City this October 24th, A. D. 1918.

[Seal Court of Claims.]

SAM'L A. PUTMAN,
Chief Clerk Court of Claims.

Endorsed on cover: File No. 26,820. Court of Claims. Term No. 240. E. W. Bliss Company, appellant, vs. The United States. Filed November 18th, 1918. File No. 26,820.

In the Supreme Court of the United States.

E. W. BLISS COMPANY, appellant, *v.* THE UNITED STATES, appellee.

No. 734. Appeal from the Court of Claims.

MEMORANDUM IN REPLY TO APPELLANT'S PETITION FOR CERTIORARI.

(1.)

Appellee respectfully submits that the record already certified by the Court of Claims is sufficient to present the whole matter to this honorable Court to enable it to consider fully and decide all questions involved in the appeal.

As the "History of the case" in the certified record shows, appellant's original petition was substituted by an amended petition which embodied the original petition and contained matter in addition thereto. The filing of this amended petition was a presentation of appellant's alleged causes of action *de novo*, in that the original petition and all proceedings thereon were superseded and merged or carried into the said amended petition.

Appellee's demurrer and motion to strike out were renewed against said amended petition and were

fully argued by oral arguments and briefs on behalf of both parties and the decision of the Court of Claims was made upon said amended petition. All questions that were raised against the original petition were raised and considered by and upon the hearing of the said amended petition.

Thereafter appellant filed a second amended petition and later a petition for rehearing, which, as shown by the certified record, the court refused to allow. Rule 25 of the "Rules of the United States Court of Claims" reads as follows:

> 25. A claimant desiring to amend his petition or to introduce new parties may do so at any time before he has closed his testimony, without special leave, by filing an amended petition embodying the amendments desired and serving a copy thereof on the Attorney General. But any such amendments or the right to introduce new parties shall be subject to the objection of the defendants either before or at the trial. *Any subsequent amendments must be by leave of court.* [Our italics.]

(2.)

As to paragraph 9, page 2, appellant's petition, the statement of the proceedings therein given is substantially correct. The facts are as follows: Appellee's demurrer and motion to strike out were brought against the (first) amended petition and the same presented by both parties in oral argument and briefs. Thereafter, at the instance of the court, as shown in the certified record, appellee was required to make its

demurrer more definite. This was done and as the case had already been fully argued and presented by the said demurrer and motion against the said (first) amended petition, it was understood by counsel for both sides that no further oral argument would be had. When the case appeared on the calendar call subsequent to the filing of appellee's more definite demurrer required by the court, appellant's counsel was not present and appellee's counsel informed the court of counsels' understanding that the case would be submitted on the briefs and so submitted the case, responding orally only to interrogations put by the court. These oral answers to the court's interrogations were apparently misconstrued as "argument" in making the entry referred to in the certified transcript, viz: "was *argued* and submitted by H. C. Workman for the defendants, counsel for claimant not being present." The reference to "argument" in said entry is understood by appellee's counsel as a clerical error.

Respectfully,

HENRY C. WORKMAN,
Attorney.

HUSTON THOMPSON,
Assistant Attorney General.

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CONTENTS.

BRIEF FOR APPELLANT.

		PAGE
I.	STATEMENT OF THE CASE	2
	Proceedings Below	2
	Plaintiff's Claim	3
II.	ASSIGNMENT OF ERRORS	8
III.	BRIEF OF ARGUMENT	11
	The Facts Pleaded	11
	The Decision Below	13
	Plaintiff's petition presents a case of contract, express or implied, and not a case of infringement	15
	The Law	18
	Plaintiff's action rests mainly upon the fundamental Leavitt patents, which alone afford support for plaintiff's claim	29
	Plaintiff's rights under the Sodeau patents, even if merely license rights, are exclusive and justify plaintiff's claim for royalty	37
	Plaintiff's claim based on 50 superheaters purchased from Whitehead is not barred	37
	Plaintiff is, in any event, entitled to recover under the Act of June 25, 1910	40

SUPPLEMENT TO BRIEF.

PAGE

As to matters contained in Petition for Certiorari for diminution of record 42

The Court of Claims had itself decided in this case that plaintiff's petition set forth a cause of action on contract 42

The Court of Claims should have permitted the filing of the Second Amended Petition 44

The Court of Claims erred in penalizing plaintiff by reason of a merely technical default 46

The Court of Claims should have granted plaintiff's Petition for Rehearing on the showing made 46

CASES CITED.

PAGE

Bethlehem Steel Co. v. United States, 42 Ct. Cl., 365. 27

Bliss v. United States, 248 U. S., 37..... 3

Cramp & Sons Co. v. International Co., 246 U. S., 28, 40 29

Dowagiac Mfg. Co. v. Plow Co., 235 U. S., 641..... 41

Dunlop Pneumatic Tyre Coy., Ltd., v. North British Rubber Coy., 21 R. P. C., 161, 172..... 33

Farnham v. United States, 240 U. S., 537..... 41

Harley v. United States, 198 U. S., 229..... 16

Littlefield v. Perry, 21 Wall., 220..... 33

McKeever v. United States, 14 Ct. Cl., 396..... 16

Palmer v. United States, 128 U. S., 662..... 16

Russell v. United States, 182 U. S., 516.....16, 22

Schillinger v. United States, 155 U. S., 163..... 16

Societe Cail v. United States, 224 U. S., 309.....16, 23

United States v. Berdan, 156 U. S., 552.....16, 20

United States v. Lynah, 188 U. S., 445..... 29

United States v. Palmer, 128 U. S., 262..... 18

Waterman v. Mackenzie, 138 U. S., 252..... 39

IN THE

Supreme Court of the United States

E. W. BLISS COMPANY, Appellant, vs. THE UNITED STATES, Appellee.	Appeal from the Court of Claims.

BRIEF FOR APPELLANT.

This is an appeal from a judgment of the Court of Claims dismissing appellant's petition for a recovery of royalties or license fees for use under contract of patented inventions.

The transcript of record is inadequate, and a petition for certiorari for diminution of record was presented to this Court, which on January 27, 1919, was denied without prejudice. Notice has been given that this petition will be renewed at the hearing of the present appeal. In view of the uncertainty regarding the granting of such petition, the main part of this brief will be based on the record as it stands, and matters resting on the desired additions to the record will be treated in a supplement (pp. 42-48).

To avoid confusion, appellant (called in the petition to the Court of Claims the "petitioner") will in this brief be referred to as plaintiff.

I.

Statement of the Case.

The principal question raised by this appeal is whether plaintiff's petition to the Court of Claims states a cause of action in contract. As a large part of plaintiff's claim arose prior to the Act of June 25, 1910, 36 Stat., 851, such portion can be sustained only upon the theory of contract, express or implied.

Another but subordinate question involves the sufficiency of plaintiff's title to certain subsidiary patents for improvements (known as the Sodeau patents).

A third but minor question involves the sufficiency of plaintiff's petition as showing that the first transaction pleaded (involving superheaters for fifty torpedoes) is not barred by the Statute of Limitations.

Proceedings Below. The original petition does not appear in the record (it is printed in Petition for Certiorari, p. 6, as "Appendix 1"). It was filed May 29, 1914. A motion by defendant to dismiss was filed, argued and dismissed (Rec., p. 1). A motion was then made by defendant to strike out certain parts of the petition, and after argument the Court required plaintiff to set forth more fully its title to patents named in paragraph 5 of the petition (the Sodeau patents) and to

amend its petition (Rec., p. 1). Thereupon plaintiff filed its amended petition (Rec., pp. 1-9) and "Appendix A" (pp. 9-12), being the instrument giving it title to such patents. Thereupon, on April 7, 1917, defendant filed a demurrer and motion to strike out parts of the amended petition (Rec., p. 12); the case was ordered on the Law Calendar, and on June 2, 1917, defendant filed a substituted demurrer and motion (given in full, Rec., p. 13), which was submitted without argument (the statement in Rec., p. 14, under VI, is incorrect; see Petition for Certiorari, p. 5); and on December 3, 1917, the Court filed its opinion (Rec., p. 14) and entered an order (p. 24). After further proceedings (Rec., p. 25), judgment was entered dismissing plaintiff's petition (pp. 25-26).

Plaintiff's Claim. Plaintiff's amended petition sets forth:

That plaintiff, a West Virginia corporation, "is the maker and owner of the Bliss-Leavitt torpedo, which it has made for many years for the United States Government" (Rec., p. 1). (That this torpedo has for many years been the standard torpedo of the United States Navy is so well known that it must be a matter of judicial knowledge; see *Bliss* v. *United States*, 248 U. S., 37.)

That plaintiff is the sole and exclusive owner of the patents for an "invention and improvements thereof" for the structure known as a "superheater."

> "That said superheater is a device whereby fuel is burned in the compressed air driving the motor by which the torpedo is propelled, so that the compressed air is heated to a high degree before its energy is utilized and

by means of which its energy is vastly increased" (Rec., p. 2, par. 3).

That said superheater invention was covered by two named patents granted February 25, 1902, to plaintiff as assignee of FRANK M. LEAVITT (p. 2, par. 4). These will be referred to in this brief as the "Leavitt patents."

That certain improvements in said superheater were invented by one SODEAU and acquired by SIR ARMSTRONG, WHITWORTH & COMPANY, LTD., who on April 10, 1905, entered into a written instrument (annexed as "Exhibit A") with plaintiff (p. 2, par. 5-a) which granted unto plaintiff and its assigns "the sole and exclusive license and authority to make, use and vend the inventions" of the recited patents for said improvements "for the whole period of the terms thereof, in the manufacture of apparatus for heating compressed air for the purpose of propelling Bliss-Leavitt torpedoes * * * and Whitehead torpedoes sold only to the United States Government" (par. 5-d).

The several Sodeau patents are named in paragraph 5, sub-paragraphs (b) and (e). The details of plaintiff's title thereto are set forth in sub-paragraphs (a), (d), (f), (g) and (h) of paragraph 5 (Rec., pp. 2-4).

That said patents *"are subservient to said" Leavitt patents, "and could not be used in torpedoes without employing the inventions covered by said" Leavitt patents* (Rec., p. 3, par. 5, sub. [c]).

That in October, 1916, defendant, through its Bureau of Ordnance of the Navy Department, requested a list of plaintiff's patents covering the Bliss-Leavitt torpedo and the amount of royalty which plaintiff would charge defendant for the use

thereof. Thereupon plaintiff furnished such list, "which included said superheater patents" (par. 9).

That on June 14, 1907, defendant by telegraph requested plaintiff's permission to purchase torpedoes from Whitehead & Company containing said superheater inventions. Plaintiff replied by telegraph that it desired to render every assistance to the Government on a proper business basis. Thereupon, on June 17, 1907, plaintiff conferred with the Chief of Ordnance, and it was agreed that the Government might purchase not more than 100 torpedoes from Whitehead, "the amount of the royalty for the use therein of said superheater inventions to be later settled and agreed upon" (p. 5, par. 9).

(Defendant's request for plaintiff's permission to purchase these torpedoes was due to the facts stated in par. 10-a.)

That subsequently defendant bought of Whitehead & Company, pursuant to said agreement, fifty torpedoes containing said superheater inventions, which were brought into the United States subsequent to June 1, 1908 (being within six years of the filing of plaintiff's petition—p. 6, par. 9).

That in November, 1907, defendant by letter requested plaintiff to submit proposals for royalty to be paid by the Government for the manufacture of superheaters for installation in Whitehead or other torpedoes, and price to be paid for superheaters manufactured by plaintiff (p. 6).

That thereupon petitioner, by letter dated November 25, 1907, proposed as royalty for the manufacture of superheaters, $500, and as price to be paid for superheaters manufactured by plaintiff, to be installed by the Government, $650 (p. 6).

That defendant, by letter of November 29, 1907, stated that the matter would be laid before the Torpedo Board on December 3, 1907, and invited plaintiff to attend. Plaintiff's executive officers attended said meeting and explained the reasonableness of said royalty (p. 6).

That by contract of June 4, 1908, defendant agreed to pay plaintiff $650 each for twenty superheaters containing said patented inventions; said contract was duly performed and the price paid (p. 6).

That defendant, by letter of December 12, 1910, requested a reduction of royalty proposed in plaintiff's letter of November 25, 1907. Plaintiff replied declining to reduce the amount of said royalty (p. 6).

That by contract of April 18, 1911, plaintiff agreed to furnish seventy-five superheaters containing said patented inventions to the Government at $650 each; said contract was duly performed and the contract price paid (p. 6).

That defendant by letter of April 27, 1911, requested additional superheaters "to replace ones on which the royalty had already been paid, and requested that for this reason the price for these new superheaters be reduced"; that accordingly, by contract of June 16, 1911, plaintiff agreed to supply 100 superheaters containing said patented inventions at $200 each; said contract was duly performed and the purchase price paid (p. 7).

That by letter of March 13, 1912, defendant repeated its request for a reduction of the $500 royalty for superheaters. Plaintiff, by letter of March 19, 1912, declined to grant any reduction, and no reduction has ever been granted, and plaintiff has never consented to the use of said patented inven-

tions or improvements by defendant without payment of said royalty of $500 each (p. 7).

That defendant purchased from Whitehead & Company additional torpedoes containing said patented superheater inventions, namely:

130	torpedoes,	July 7, 1908;
180	"	March 29, 1911;
50	"	October 25, 1911.

That, in addition, defendant has made since April 13, 1915, or is engaged in making, 100 superheaters in the United States containing said patented improvements (p. 7, par. 10).

That prior to said telegraphic request of June 14, 1907, said Armstrong Company had licensed Whitehead & Company to use the Sodeau inventions, but subject to plaintiff's rights under contract of April 10, 1905 (Appendix A), and that shortly before June 14, 1907, said Whitehead & Company informed the Bureau of Ordnance of the United States Navy that they were not at liberty to sell Whitehead torpedoes to the United States containing such superheater, without plaintiff's permission; that the Chief of Ordnance so informed plaintiff and requested plaintiff's permission, because defendant knew that under said contract (Appendix A) plaintiff alone had the right to sell such superheaters to the United States (p. 7, par. 10-a).

That the fair and reasonable royalty for each of said superheaters is $500, which is also the stipulated and agreed royalty, as above stated (p. 8, par. 11).

That plaintiff has at various times demanded from defendant payment of said royalty of $500

for each of the 510 superheaters referred to, but the defendant has paid no part thereof and is indebted to plaintiff in the sum of $255,000, which is due and unpaid (p. 8, par. 12).

Following the above are the necessary formal averments (p. 8, pars. 13-16).

The provisions of the Armstrong-Bliss contract, marked Appendix A, and their legal effect, will be hereinafter set forth in the argument.

II.

Assignment of Errors.

The plaintiff-appellant presented on this appeal the following assignment of errors:

1. The Court erred in holding and deciding that plaintiff's petition does not set forth a cause of action *ex contractu*.

2. The Court erred in holding and deciding that plaintiff's petition does not set forth a cause of action *ex contractu* except as to superheaters in the first 50 torpedoes referred to in paragraph 9.

3. The Court erred in holding and deciding that as to such 50 torpedoes plaintiff's claim is not so set forth in its petition as to negative the bar of the Statute of Limitations.

4. The Court erred in holding and deciding that as to the remaining 460 superheaters set forth in plaintiff's petition, such petition sets forth no cause of action, and in refusing to allow plaintiff to take evidence in support of its claim for compensation therefor.

5. The Court erred in holding and deciding that plaintiff's petition as amended does not set forth such title to the patents claimed under as will support plaintiff's claim to recover compensation for the purchase and use by defendant of torpedoes or superheaters therefor, containing the patented inventions.

6. The Court erred in holding and deciding that plaintiff's petition does not set forth legal title in plaintiff to the Leavitt patents recited in paragraph 4.

7. The Court erred in holding and deciding that plaintiff's petition as amended does not set forth such title or rights in plaintiff to or under the Armstrong Company's patents recited in paragraph 5, sub-paragraphs (a) to (h) inclusive, as enabled plaintiff to enter into an agreement with defendant for the purchase and use by defendant of torpedoes or superheaters containing the patented inventions, and entitled plaintiff to recover compensation for such use.

8. The Court erred in denying plaintiff's petition to file the second amended petition.

9. The Court erred in denying plaintiff permission to file so much of said second amended petition as was within the authorization to amend contained in the Court's order of December 3, 1917, namely, the amendments to paragraph 9 contained in sub-paragraph (c).

10. The Court erred in holding that plaintiff was in default in failing to amend its petition as required in the Court's order of December 3, 1917, within the time (January 15, 1918) limited in said order, in view of the showing that neither plain-

tiff's attorney nor counsel had been served with said order or otherwise notified thereof, and the plaintiff and its counsel had no knowledge of the time limit in said order until after said time had expired.

11. The Court erred in refusing to excuse the alleged default of plaintiff in failing to so amend its petition within the time (January 15, 1918) limited in said order of December 3, 1917, in view of the showing on plaintiff's motion that plaintiff's attorney of record was then mortally ill and died five days after the entry of said order, that plaintiff's other counsel were remote from the Court, and its senior counsel was immediately afterward incapacitated by serious illness from attending to any business, and the remaining counsel did not learn of the entry of said order, or of said time limit, until after said time had expired, and although preoccupied with other court engagements, diligently proceeded to procure information and prepare such second amended petition and a petition for leave to file the same, and a brief thereon, and other papers, and filed all such papers February 18, 1918.

12. The Court erred in denying plaintiff's petition for rehearing in the face of the showing in such petition that the Court had erred in matter of law, in holding that plaintiff's petition did not, except as to the first 50 torpedoes or superheaters therefor set forth therein, set forth a cause of action *ex contractu*.

13. The Court erred in dismissing plaintiff's petition.

14. The Court erred in dismissing plaintiff's petition *in toto* under Rule 18 of the Rules of the Court

of Claims, when the alleged uncertainty as to when its claim first accrued applied to only 50 torpedoes, and the petition was free from uncertainty as to the remaining 460 torpedoes or superheaters therefor, on which plaintiff's petition is based.

15. The Court erred in dismissing plaintiff's petition as to 330 torpedoes or superheaters therefor as to which said petition avers that defendant purchased or has made the same at dates since June 25, 1910, and as to which plaintiff has a cause of action for infringement under the Act of June 25, 1910 (36 Statutes, 851).

III.

Brief of Argument.

The decision below being on demurrer, the facts pleaded in the petition are to be taken as established for the purposes of this appeal.

The Facts Pleaded. The allegations are, briefly, that plaintiff, being the owner and maker of the Bliss-Leavitt torpedo, which it has made for many years for the United States Government, acquired from its assignor LEAVITT patents for a "superheater," which constituted an important improvement in torpedoes whereby the energy of the torpedo is vastly increased, and that one SODEAU invented certain improvements thereon covered by subservient patents which were assigned to the ARMSTRONG COMPANY, from which plaintiff acquired exclusive rights in the United States. That in 1906 the defendant, through its Navy Department, requested

a list of plaintiff's patents and the amount of royalty which plaintiff would charge thereunder; and plaintiff furnished such list, including its superheater patents (par. 9-b). That in June, 1907, the defendant, desiring to purchase torpedoes from Whitehead & Company, and being informed by said company that they were not at liberty to sell these containing the Armstrong superheater without plaintiff's permission, requested plaintiff's permission to purchase torpedoes from Whitehead & Company containing such superheater inventions, and plaintiff then consented to such purchase of 100 torpedoes containing such superheater inventions, the amount of royalty therefor to be later settled and agreed upon, and defendant thereupon purchased 50 such torpedoes. That in November, 1907, defendant again asked plaintiff for royalty proposals, and plaintiff then proposed a royalty for the superheater of $500 each, and offered to manufacture superheaters for $650 each, which amount included such royalty. That thereafter, in June, 1908, and again in April, 1911, the defendant contracted for two lots of superheaters at $650 each according to such proposal. That in 1911 defendant wanted additional superheaters to replace those on which the royalty had already been paid and requested for this reason that the price be reduced, and accordingly a contract was made for such additional superheaters at $200 each. That in addition to said first purchase of 50 torpedoes from Whitehead & Company, defendant in 1908 and 1911 purchased three other lots of such torpedoes containing such superheaters; and that defendant has since made 100 superheaters in the United States. And that on two occasions, in December, 1910, and

March, 1912, defendant asked plaintiff to reduce its royalty of $500 for superheaters; that plaintiff both times declined to grant such reduction and has never consented to receive less than $500 royalty from defendant for the use of each such superheater.

The Decision Below. The Court of Claims discusses first its jurisdiction prior to the Act of June 25, 1910, when it had no jurisdiction over claims for damages in cases "sounding in tort," and the enlargement of its jurisdiction by that Act to cases of alleged infringement.

It then cites (p. 15) certain decisions of the United States Supreme Court, wherein it was held that the Court of Claims had no jurisdiction, because on the facts pleaded or proven there was no contract, express or implied, on which the claim was based.

The Court then further considers the effect of the Act of 1910 (p. 16), and then enters upon a discussion of the title under which the "owner" of a patent may recover compensation under that Act. Its reasoning on this question of title (p. 17) appears to proceed on the theory that this suit was brought under the Act of 1910, whereas it was brought on the theory of contract, not of tort.

The Court then subdivides the transactions alleged in the petition as (1) the purchase by the Government of 50 Whitehead torpedoes containing the superheater in question; (2) the purchase by the Government at different times in 1908 and 1911 of 360 Whitehead torpedoes containing said superheater; (3) the making by the Government of an additional 100 of such superheaters.

The Court then proceeds (pp. 18, 19) to discuss plaintiff's title under the Armstrong contract (Appendix A), stating that "the question before us is whether the right granted by the Armstrong Company to the Bliss Company" in terms stated "amounts to such a transfer of ownership as will sustain an action by the Bliss Company under the Act of 1910" (p. 20). Herein the Court erred in assuming that the suit was brought under the Act of 1910. The Court then, after further discussion (p. 20), reaches the conclusion (p. 21) that "the grant to the Bliss Company was a mere license" and the plaintiff "being a mere licensee cannot sue for infringement," wholly overlooking that this suit was not brought for infringement, but for recovery of damages based upon contract.

The Court holds that the claim as to the 100 superheaters made by the United States is a claim for infringement. Plaintiff contends that this is a claim for a licensed use of the invention, being the reverse of infringement.

The Court holds that the claim for the 360 torpedoes purchased is not based on contract, express or implied, because "it is not averred that defendant purchased them with plaintiff's consent or permission * * *. The defendant dealt with Whitehead and Co. not in recognition of any rights of the plaintiff, but in antagonism to and disregard of them" (p. 21). Further, that plaintiff cannot maintain this action by reason of said 360 torpedoes on the theory of tort because the plaintiff "being a mere licensee and not the owner of the patents, cannot sue for infringement" (p. 22), wholly ignoring the allegation of the petition that as respects the fundamental Leavitt patents, the plaintiff is

the sole owner thereof, so that on these patents it could maintain its action on either the theory of tort or the theory of contract.

As regards the first 50 torpedoes (which the Court discusses, pp. 22, 23), the Court is apparently in doubt whether the allegations are sufficient to establish a contract; but holds that the allegations do not establish that plaintiff's claim as to these had accrued within six years prior to the filing of the original petition, and directed that plaintiff make more specific the allegations as to the alleged agreement and date of purchase of the 50 superheaters (p. 24).

Plaintiff attempted to comply with this requirement and filed a second amended petition, but "the Court overruled the motion for leave to file such second amended petition" (p. 25), and entered judgment dismissing the petition (p. 26).

Plaintiff's petition presents a case of contract, express or implied, and not a case of infringement.

This suit was brought on the theory that the Government had used plaintiff's patents with plaintiff's consent and under an agreement, partly expressed and partly implied, that plaintiff should be paid a royalty for each superheater used.

Plaintiff's principal patents as stated in the petition are the Leavitt patents, and for the discussion of this question it is needless to consider plaintiff's title to the subordinate Sodeau patents.

The crucial distinction where claims under patents are presented in the Court of Claims is whether the Government used the invention in recognition of the rights of the patentee, or in disregard and

infringement thereof. When the Government has not disputed or denied the patentee's rights and has used the invention upon his invitation or with his consent, its use has invariably been held to be a use pursuant to contract, either express or implied, and to involve liability of remuneration, either by the payment of an agreed royalty or upon a *quantum meruit* as a fair and reasonable royalty.

> *Palmer* v. *United States,* 128 U. S., 662.
> *McKeever* v. *United States,* 14 Ct. Cl., 396 (affirmed by Supreme Court without opinion).
> *United States* v. *Berdan,* 156 U. S., 552.
> *Societe Cail* v. *United States,* 224 U. S., 309.

In the contrary class of cases, where the Government had no dealings with the patentee, where if he offered his invention it was refused, where his patent was not recognized or acquiesced in, and where the use by the Government was clearly hostile to the claims of the patentee, then—and only in such cases—the Government's use of the invention has been held to be an infringement, or a case sounding in tort. Of such are

> *Schillinger* v. *United States,* 155 U. S., 163.
> *Harley* v. *United States,* 198 U. S., 229.
> *Russell* v. *United States,* 182 U. S., 516.

The Court of Claims in its decision appealed from holds as to superheaters for 460 torpedoes that the averments of the petition bring plaintiff's claim

under the rule of the second class of cases above cited. The true view, it is submitted, is that such averments come clearly under the rule of the first class of cases.

No fact averred indicates that at any time the Government disputed or denied plaintiff's rights as the patentee of the superheater in question. On the contrary, the facts pleaded indicate clearly that the Government recognized plaintiff's ownership of controlling patents covering this superheater. This is evidenced by the Government's adoption of the Bliss-Leavitt torpedo containing this superheater; by its application to plaintiff for permission to buy from Whitehead torpedoes containing this superheater; by its request for a list of plaintiff's patents, and for a statement of royalties proposed; by its subsequent acknowledgment of plaintiff's proposition as to royalty, and designation of a board to consider the same; by its twice contracting for superheaters at a price of $650 pursuant to plaintiff's proposal, which was alternative to a royalty of $500, the larger sum including this royalty; and by its ordering of a lot of superheaters to replace those on which royalties had been paid, and at a price ($200) indicating that the royalty was remitted. These facts are consistent only with the recognition of plaintiff's patents and an acknowledgment that defendant had the right to use them only on payment of royalty, and an acquiescence in the sum of $500 as a fair royalty. Twice, however, the Bureau requested the plaintiff to reduce this royalty, which plaintiff twice declined to do; these facts are not inconsistent with the other facts pleaded, but tend strongly to support the conclusion that it was the understanding of the Govern-

ment's officers that its use of the superheater required the payment of a royalty, and an effort merely to make a better bargain by reducing the amount thereof.

The facts thus pleaded, we contend, justify no other conclusion than that plaintiff's claim is founded upon contract, which in the case of the first 50 torpedoes was an express contract, leaving only the amount of royalty indeterminate; and in the case of the remaining 460 torpedoes or superheaters, was necessarily implied from all the facts recited, which indicate a complete understanding between the parties, even as to the amount of royalty.

The Law. The cases already decided by this Court concerning claims for patent royalties based upon the showing of a contract, express or implied, unquestionably establish the correctness of plaintiff's contention.

In *United States* v. *Palmer,* 128 U. S., 262, the facts were that Palmer, upon the appointment of an Army board to consider equipments for infantry soldiers, exhibited his patented inventions to said board, which considered the same and recommended their adoption by the War Department, and they were subsequently adopted and largely manufactured. The Government defended on the ground that the plaintiff's claim was founded on a tort and not a contract. The Supreme Court said:

> "This assumption of the appellant is erroneous. No tort was committed or claimed to have been committed. The Government used the claimant's improvements with his consent; and, certainly, with the expecta-

> tion on his part of receiving a reasonable compensation for the license. This is not a claim for an infringement, but a claim of compensation for an authorized use—two things totally distinct in the law, as distinct as trespass on lands is from use and occupation under a lease. The first sentence in the original opinion of the court below strikes the keynote of the argument on this point. It is as follows: 'The claimant in this case invited the Government to adopt his patented infantry equipments, and the Government did so. It is conceded on both sides that there was no infringement of the claimant's patent, and that whatever the Government did was done with the consent of the patentee and under his implied license.' We think that an implied contract for compensation fairly arose under the license to use, and the actual use, little or much, that ensued thereon. The objection, therefore, that this is an action for a tort falls to the ground."

In the case at bar plaintiff's torpedoes had been presented to and adopted by the Government, which implies an official recognition of the patents for the inventions embodied therein; the Government had asked proposals as to royalties for the superheater, from which a recognition of plaintiff's rights as patentee is to be implied; the Government had expressly asked and received plaintiff's permission to import torpedoes containing the patented superheaters; and it had repeatedly purchased superheaters from plaintiff on terms involving an acquiescence in the royalty named by plaintiff. In the *Palmer* case the facts that no royalty was agreed to, and that no express license

was given, were held not to defeat a claim for fair and reasonable royalty.

In *United States* v. *Berdan Firearms Co.*, 156 U. S., 552, the facts were that Berdan invented an extractor ejector for guns and assigned the patent to the petitioner; he was in constant communication with the ordnance officers and requested the use of his devices by the Government. One of his inventions was exhibited in competition with other guns to a board of officers, which recommended the adoption of his invention; but no gun was bought by the Government from the petitioner and none manufactured which was a copy of the one recommended. The Government, however, used a similar construction, except that a different spring was used, which this Court found to be an immaterial difference.

The Supreme Court held that something more than a mere infringement or tort was necessary to maintain the action; and, reviewing the findings, said:

> "So far, then, as the petitioner is concerned, the use of this invention was with its consent, in accordance with its wish, and with the thought of compensation therefor."

The case at bar involves precisely the same circumstances. This Court further said:

> "While the findings are not so specific and emphatic as to the assent of the government to the terms of any contract, yet we think they are sufficient. There was certainly no denial of the patentee's rights to the invention; no assertion on the part of the government that the patent was wrongfully issued;

> no claim of a right to use the invention regardless of the patent; no disregard of all claims of the patentee, and no use in spite of protest or remonstrance. Negatively, at least, the findings are clear. The government used the invention with the consent and express permission of the owner, and it did not, while so using it, repudiate the title of such owner" (156 U. S., 567-568).

This Court further found that the War Department had neither admitted nor denied claimant's right to compensation, although the Army officers regarded Berdan as the inventor of the device; "that they used it with his permission as well as that of his assignee, the petitioner, and that they used it with the understanding that the government would pay for such use, although they did not believe themselves to have the authority to agree upon the price." This Court held that these facts brought the case clearly within *United States* v. *Palmer, supra,* and showed that it was not founded upon a tort, "but upon a contract to which both parties assented."

This holding in the *Berdan* case applies with much greater strength in favor of plaintiff's claim in the case at bar, where the facts pleaded are immeasurably stronger than those found in the *Berdan* case.

The Supreme Court further said:

> "That no price was agreed upon, or that the officers of the government were not authorized to agree upon a price, is immaterial."

So in the present case, although the price for some superheaters was agreed upon, it would clearly appear that a failure to agree on a price for all superheaters does not tend to defeat plaintiff's claim.

In passing, it may be well to consider wherein the two cases above cited, and plaintiff's case at bar, differ from the case of *Russell* v. *United States*, 182 U. S., 516 (cited by the Court of Claims in its opinion, Rec., p. 15). Russell claimed that certain features of his patented rifle were contained in the Krag-Jorgensen magazine gun which had been lately adopted by the War Department. The War Department declined to recognize or consider his claim. The Supreme Court, after reviewing the facts, said:

> "It was not deemed necessary even to grant his request for a hearing. His rifle was not adopted; another was. There was no concession of his rights. * * * Indeed, the Ordnance Office twice wrote Captain Russell that his case could not be determined by it. No contract, therefore, based on the action of that office can be claimed. If petitioners have suffered injury, it has been through the infringement of their patent, not by a breach of contract, and for the redress of an infringement the Court of Claims has no jurisdiction" (182 U. S., 535).

The crucial distinction between these opposing cases is that in the *Palmer* case and the *Berdan* case "The claimant invited the government to adopt his patented invention and the government did so"; while in the *Russell* case "His rifle was not adopted; another was. There was no concession of his rights." In the case at bar, the Bliss-

Leavitt torpedo was offered to and adopted by the Government; it contained the superheater in issue; the Government repeatedly purchased superheaters separately, at a price which was understood to include the royalty; the Government expressed its desire to manufacture these superheaters itself, and accordingly asked plaintiff to propose a suitable royalty, and plaintiff did so; and the Government, desiring to purchase a foreign and competing torpedo containing the same superheater invention, applied to plaintiff for its permission so to do, which permission plaintiff gave on the understanding that the question of royalties would be adjusted later. These facts bring the present case within the holdings in the *Palmer* and *Berdan* cases, and effectually distinguish it from the *Russell* case.

In *United States* v. *Societe Anonyme etc. Cail*, 224 U. S., 309, the claim was based upon the De Bange obturator or gas check for breech-loading cannon to prevent the escape of gas. The facts found were that a board of Army and Navy officers concerning heavy ordnance, visited the claimant's works at Paris and reported on the De Bange gas check; that a specimen was forwarded from France by our naval attaché; that our ordnance officers, after experimenting with it, adopted it, and have used no other device since; that the Government never disputed the claim of De Bange as inventor; that De Bange repeatedly wrote to the Government urging that he should be remunerated; that the Bureau of Ordnance stated that they had no funds applicable for the payment of any such claim, and the Secretary of the Navy suggested that the applicant refer the matter to the Court of Claims.

The Government's contention was that the mere use of a patentee's invention with his knowledge does not create an implied contract in fact to pay for such use, and that there must be, first, a use with the patentee's assent, and, second, a meeting of minds as to compensation for the use. The Supreme Court said:

> "But these elements do not have to appear by the explicit declaration of the parties. They may be collected from their conduct. The alternative of a contract is important to be kept in mind. The officers of the government knew of the De Bange invention and were aware of its great importance, and the purpose to deliberately take property of another without the intention that he should be compensated—in other words, to do plainly a wrongful act—cannot be imputed to them without the most convincing proof. Such proof does not exist in the present case. On the contrary, the record shows that compensation was contemplated."

This Court cited with approval the extract hereinabove made from the *Berdan* case, and said: "Like comment may be made of the facts in the case at bar"; and, after further discussion, held that the Court of Claims had jurisdiction (224 U. S., pp. 321-322).

Here was a case where the Government adopted an invention that had apparently not even been offered to it, although the inventor and his assignees subsequently signified their assent and demanded compensation. This Court said: "There was hesitancy and doubt, not as to compensation, but as to the amount and extent of it" (p. 320). Here, again, the fact that the minds had not met on the

amount of the compensation or royalty is found by this Court to be no obstacle to the conclusion that an implied contract existed.

The Court of Claims in its opinion appears to hold (Rec., p. 21) that the first 50 Whitehead torpedoes with superheaters purchased with plaintiff's express consent, support plaintiff's claim for compensation by royalty, although the amount of royalty was not agreed; but that, as to the remaining 360 torpedoes purchased from Whitehead & Company, this claim "is not based upon contract, express or implied" (p. 21).* The fact averred is that plaintiff gave its consent to the use of its patented inventions by the Government in the expectation of receiving a reasonable royalty; but has never consented to accept a lower royalty than that which it proposed. The use, nevertheless, by the Government, has been with plaintiff's full consent and license. This, we submit, is the obvious intent of the pleading, although the statement might have been more clearly expressed.

As to the 360 torpedoes last purchased by the Government from Whitehead & Company, the Court

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* This conclusion is apparently in part based upon the statement at end of paragraph 9 of plaintiff's petition (Rec., p. 7), that "petitioner has never consented to the use of the said patented inventions * * * by defendant without payment of said royalty of five hundred dollars," an expression which was not intended to receive the interpretation which the Court has given it, and which is corrected in the second amended petition to read: "and petitioner has never consented to receive for the use of said patented inventions * * * a less compensation than said royalty of five hundred dollars each."

below infers that the Government dealt with Whitehead & Company "not in recognition of any rights of the plaintiff, but in antagonism to and disregard of them."* The pleading on which this holding was based (par. 10) is a mere statement of facts following and coincident with the circumstances recited at length in paragraph 9, the intended and necessary inference from which is that these purchases and manufacture of 460 superheaters by the Government were pursuant to its understanding with plaintiff and by plaintiff's express consent. The agreement was complete except as to the exact amount of royalty to be paid, and as to this plaintiff is at least entitled to a *quantum meruit*.

It is further submitted that, in the light of the Government's adoption of the Bliss-Leavitt torpedo, its continued use of this torpedo as the standard torpedo in the Navy, its continuous recognition of plaintiff's rights under its patents for this torpedo, including the superheater patents, its repeated orders for superheaters at plaintiff's prices, both with and without royalty, its request for terms as to royalty so that it might manufacture under license, and the pains taken to procure plaintiff's consent when it was first

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* Plaintiff proposed in the second amended petition to make this pleading more explicit by adding the following to par. 10:

> "And that all of said purchases, so far as concerns the superheaters in or adapted to said Whitehead torpedo, and all of said manufacture of superheaters by defendant, have been with petitioner's consent and license and with the understanding and expectation by petitioner that petitioner should receive therefor its royalty for said superheaters as hereinbefore stated."

proposed to import 100 Whitehead torpedoes including plaintiff's patented superheaters—it necessarily follows from this long and consistent record that the Government in its later importations of Whitehead torpedoes containing such superheaters cannot be presumed to have suddenly reversed its oft-declared policy and conduct and to have adopted an inconsistent position of hostility towards plaintiff's rights. On the contrary, the fair inference is that these later purchases were understood and implied to be upon the same basis as to license and royalty as the first purchase, for which plaintiff's express license was obtained. To adopt the language of the Supreme Court in the *Societe Cail* case, above cited,

> "The purpose to deliberately take property of another without the intention that he should be compensated—in other words, to do plainly a wrongful act—cannot be imputed to them (the Government's officers) without the most convincing proof" (224 U. S., 321).

Among the decisions of the United States Supreme Court we find no case in which any such inference is drawn contrary to an inconsistent line of conduct.

The decision of the Court below in the case at bar is inconsistent with its holding in the case of *Bethlehem Steel Co.* v. *United States,* 42 Ct. Cl., 365, in which said Court decided that where certain trial guns were first made by express permission of the patentee, and the Government later made other guns without his knowledge, a contract to pay royalty for the use of the invention was to be inferred. That case was less favorable to the claimant than

this, because there the Government's use was made without the plaintiff's knowledge. But the Court of Claims, after showing that the Government had recognized the claimant's private ownership, said:

> "With such knowledge on the part of the officers of the Government respecting private ownership of a patent, it would be a monstrous injustice to hold that because the owner had no knowledge of the use of its patent at the particular time, therefore no promise to pay can be implied."

We submit that this case should have been conclusive in support of plaintiff's claim to remuneration for superheaters in the 360 Whitehead torpedoes subsequently purchased by the Government without procuring plaintiff's express consent and license. Plaintiff had already given its license to an earlier purchase, and its continued license for the later purchases must be implied. Plaintiff had reason to fully expect remuneration to the extent of the use by the Government of its patented inventions.

This Court, in *United States* v. *Lynah,* after reviewing numerous prior decisions, including those in the *Palmer* case and the *Berdan* case, said:

> "The rule deducible from these cases is that when the Government appropriates property which it does not claim as its own, it does so under an implied contract that it will pay the value of the property it so appropriates" (p. 464).
>
> * * * * * *
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> "Whenever in the exercise of its governmental rights it takes property the ownership of which it conceded to be in an indi-

vidual, it impliedly promises to pay therefor. Such is the import of the cases cited, as well as of many others" (p. 465).

United States v. *Lynah,* 188 U. S., 445.

The Supreme Court has stated that at the time of the enactment of the Act of 1910, it was indisputably established that,

> "where an officer of the United States, within the scope of an official authority vested in him to deal with a particular subject, having knowledge of existing patent rights and of their validity, appropriated them for the benefit of the United States by the consent of the owner, express or implied, upon the conception that compensation would be thereafter provided, the owner of the patent right taken under such circumstances might, under the statute law of the United States permitting suits against the United States on contracts, express or implied, recover by way of implied contract the compensation which might be rightly exacted because of such taking."

Cramp & Sons Company v. *International Company,* 246 U. S., 28, 40.

Plaintiff's action rests mainly upon the fundamental Leavitt patents, which alone afford support for plaintiff's claim.

The Court of Claims apparently was led astray by the lengthy recitals of title concerning the Sodeau patents, and wholly overlooked the greater importance given by plaintiff's petition to the Leavitt patents.

The petition defines the "superheater" and states that by its use the compressed air driving the motor by which the torpedo is propelled "is heated to a high degree before its energy is utilized, and by means of which its energy is vastly increased" (p. 2, par. 3). And that this "said superheater invention" was covered by two recited patents "duly granted on February 25, 1902, to petitioner as the assignee of the inventor Frank M. Leavitt" (par. 4).

If the petition had stopped here and had not recited the later Sodeau inventions for improvements over the Leavitt superheater, the Court could not have justified its conclusion that plaintiff did not have such title as would sustain this suit, because the petition recites the grant of the two Leavitt patents to plaintiff as the assignee, and further recites in detail the respective assignments (par 4).

Coming then to the Sodeau improvements, it recites "that certain *improvements* in said superheater" made by Sodeau were acquired by the Armstrong Company, and establishes their subordinate position by the statement that each and all of said patents "were and are *subservient to* said patents Nos. 693,871 and 693,872 [the Leavitt patents] and could not be used in torpedoes without employing the invention covered by said last-named patents" (p. 3, sub-par. *c*).

The Leavitt patents were granted February 25, 1902. The Sodeau patents came long afterward, being based upon an English patent dating from November 17, 1904, corresponding United States patents having been granted in August, 1906 (p. 2, sub-par. *b*), and the later patents having dates ranging between 1906 and 1911 (p. 3, sub-par. *c*).

We submit that as to the Leavitt patents, plaintiff's petition recites absolute ownership by plaintiff, affording a foundation for this action whether on the theory of contract, or as an action for infringement under the Act of 1910.

Plaintiff's rights under the Sodeau patents, even if merely license rights, are exclusive and justify plaintiff's claim for royalty.

The questions as to plaintiff's title under the Sodeau patents, derived from the instrument "Appendix A" (Rec., p. 9) between the Armstrong Company and plaintiff, may be thus stated:

1. Whether the plaintiff has such legal title as would justify a suit for infringement under the Act of June 25, 1910.

2. Whether the plaintiff has such exclusive license rights as justify a suit for the recovery of royalties under a contract, express or implied, with the Government.

The Court below in its opinion has decided the first of these questions adversely to plaintiff, *but has left the second question undecided.*

The question as to whether plaintiff's title under "Appendix A" amounts to a legal title is not an essential question on this appeal. It might become important in case upon the trial of this action on the merits the Court of Claims should find that the evidence did not bear out the allegations in the pleadings as to the existence of a contract for royalty. In such event plaintiff would lose all recovery based upon superheaters made or purchased by the

Government prior to the Act of June 25, 1910. As to such since acquired plaintiff could unquestionably maintain an action of infringement by reason of its ownership of title in the fundamental Leavitt patents. If it could not then show title to the Sodeau patents it might be necessary for the Court to assess damages separately for infringement of the Leavitt patents alone. But if plaintiff could at that time show that under a proper interpretation of the instrument, "Appendix A," plaintiff had acquired the requisite title to the Sodeau patents, it would then be entitled to recover damages by reason of the infringement of those patents.

But as now presented the pleadings are drawn on the theory of contract. On this theory plaintiff submits that its exclusive rights under the Sodeau patents are sufficient to justify the recovery of a royalty thereunder *which the Government agreed to pay.*

Plaintiff's contention is a simple one. Accepting *arguendo* the lower Court's conclusion that the instrument, Appendix A, conveys a mere license, yet this license grants to plaintiff

> "the *sole and exclusive license* and authority to use and exercise the said inventions under the said Letters Patent * * * in the manufacture of apparatus for heating compressed air for the purpose of propelling Bliss-Leavitt torpedoes wherever sold by the Bliss Company, and Whitehead torpedoes sold only to the United States Government" (p. 10, par. 2).

There can be no doubt about the intent of this provision. It does not use the words "exclusive right

to make, sell and use" which are current in this country, but instead uses a phrase, viz., "the sole and exclusive license and authority to use and exercise" the invention, which, under English law, is of equivalent meaning.

> *Dunlop Pneumatic Tyre Coy., Ltd.,* v. *North British Rubber Coy.,* 21 R. P. C., 161, 172.

If there were any doubt about the meaning of this phrase it is set at rest by the language following, viz., "in the *manufacture* of apparatus * * * wherever *sold* * * * and * * * *sold* only to the United States Government."

Thus the granting clause contemplates the rights of manufacture, use and sale, and these rights are exclusive.

The fact that the enjoyment of these exclusive rights is conditional upon the obligation for future payments of royalties is immaterial. Such a provision may exist in an instrument interpreted as an assignment rather than a mere license.

> *Littlefield* v. *Perry,* 21 Wall., 220.

The exclusive rights conferred upon the Bliss Company are confirmed by the provision in Article 9 that the Armstrong Company shall not at any time during the continuance of this license

> "use or exercise the said invention, or any such future improvement or improvements as hereinafter mentioned; or grant any license to any other person or persons whomsoever to use or exercise the same, or any such improvement or improvements, for the

> purpose of propelling Bliss-Leavitt torpedoes, *or* Whitehead torpedoes, so far as such Whitehead torpedoes may be intended for sale to the United States Government."

These provisions constitute a covenant in aid of the exclusive grant contained in Article 2. The reference to "any such future improvement or improvements as hereinafter mentioned" refers to the covenant in Article 10 to communicate to the Bliss Company any improvement or addition to the said invention, or substitute therefor, so that the exclusive rights of the Bliss Company were extended to future inventions and made inclusive of all the Sodeau patents recited in the petition.

From the whole tenor of the instrument it is clear that it was the intention of the parties that the E. W. Bliss Company should enjoy the exclusive manufacture and sale of superheaters for torpedoes for the use of the United States Government. It was, of course, expected that the plaintiff would itself manufacture these superheaters (either as part of the torpedoes or independently) and sell them to the United States. But when the Government determined that it wished to manufacture these superheaters itself, it was appropriate that its application for permission to do so, so far as concerns the Sodeau improvements, should have been made to the E. W. Bliss Company and not to the Armstrong Company, because the Armstrong Company had excluded itself wholly from the manufacture, sale and use of the Sodeau inventions in torpedoes for the United States Government. It had done this by granting exclusive rights to the E. W. Bliss Company for the only two torpedoes then known or since or ever in ex-

istence or use, namely, the Whitehead torpedo and the Bliss-Leavitt torpedo. Hence, as these exclusive rights reposed in the plaintiff, the Government properly applied to the plaintiff for its license to manufacture. It also properly applied to plaintiff for its license to import torpedoes containing such superheaters, because to make them without plaintiff's license, or to use those made otherwise than with plaintiff's consent, would be an invasion of plaintiff's exclusive right.

The intent of the license agreement was that plaintiff should manufacture said superheater for use of the Government, that the Government should have the use of the invention, and that plaintiff should receive a profit therefrom by reason of its function as manufacturer and its position as exclusive licensee. It was precisely as if a patentee, A, licensed a manufacturer, B, to supply exclusively the requirements of C, a customer. In such case the party C could not have his needs filled by A, who had divested himself of the right to supply C. C could apply only to B. And if C preferred to manufacture for himself, he could acquire the right to do so only from B. In such case B, instead of making his patentee's profit as a part of his manufacturing profit, would take it in the form of a license fee or royalty.

So far as concerns the three parties in interest, namely, the Armstrong Company, the plaintiff, and the defendant, it makes absolutely no difference whether the superheaters are made by the plaintiff and sold to the defendant for a price which includes the patent fee or royalty, or are made by the Government for its own use, with the payment to plaintiff of the same royalty, or are made by some third

party under contract for the Government, and the latter pays to plaintiff the same royalty. In either case the Government gets its torpedo superheaters at a certain price; the plaintiff gets its remuneration either in its manufacturer's profit or as a royalty; the Armstrong Company in turn gets its stipulated royalty.

The Government, having recognized plaintiff's patents, having asked for royalty proposals, having acknowledged these, having procured superheaters from plaintiff according to those proposals, and having then proceeded to manufacture 100 superheaters for itself, is impliedly making these under license from the plaintiff and under obligation to pay an agreed royalty, or a fair and reasonable royalty. The Government, having applied for and received this license permission, and proceeded thereunder and enjoyed the advantages thereof, is not to be heard to question plaintiff's right to grant the license privilege. The case comes under the well-established principle that a grantee is estopped from questioning the title of his grantor.

The Government is in the position of a sub-lessee who, having occupied the premises, claims that the lease to the sub-lessor did not in terms carry the right to sub-lease the premises, and therefore refuses to pay rent.

Nor is the situation any different regarding the 360 torpedoes subsequently purchased from Whitehead & Company. As to these, the Government, instead of itself building the superheaters under license, procured Whitehead to build these for it. It is as though C, having been licensed by B to make for himself the patented article, finding it more convenient to have these made at some other

shop, employs D to make the articles and deliver them to C. This in law is precisely the same as if C made the articles for himself. *Qui facit per alium facit per se.*

Any logical chain of reasoning concerning the respective rights of the several parties under the Sodeau patents necessarily arrives at the result that anything done by agreement between the Government and plaintiff whereby the Government acquired the patented superheaters for use in the Whitehead torpedo or the Bliss-Leavitt torpedo, is within the agreement (Appendix A) if the plaintiff is to enjoy the benefit of its exclusive license; and it can enjoy this benefit only if it receives a fair return either in a manufacturing profit, including royalty, or by the receipt of a royalty dissociated from a manufacturing profit. Any other interpretation puts the Government in the position of a piratical tort feasor; a conclusion wholly inconsistent with the whole attitude of the Government concerning the inventions embodied in the Bliss-Leavitt torpedo, including the superheater inventions in issue.

For these reasons, and because this conclusion is essential to justice between the parties, it is submitted that the holding of the Court below on this question should be reversed.

Plaintiff's claim based on 50 superheaters purchased from Whitehead is not barred.

As to the first 50 superheaters purchased from Whitehead & Company, the Court below in its opinion apparently finds (Rec., pp. 22, 23) that the averments of plaintiff's petition are sufficient to

make out a case of express contract, except perhaps as to the amount of the royalty, but raises a question as to whether plaintiff's claim as to these may be barred by the statute of limitations. The Court says (p. 23) that the petition "does not fix the date of their purchase under the agreement mentioned," namely, the agreement made on or about June 17, 1907, and requires that the plaintiff make the allegations more specific.*

The Court intimates (p. 24) that the bar of the statute of limitations would commence to run from the date of *purchase* of the 50 superheaters in question. This is not a necessary conclusion. The Court correctly states that the bar "did commence to run when the claim first accrued," and that "a claim first accrues when a suit may first be brought upon it."

In plaintiff's amended petition (Rec., p. 6) this date is easily determined by implication. The Government wished plaintiff's consent to the importation of Whitehead torpedoes containing superheaters, not because Whitehead & Company could not manufacture or sell the superheaters (which they had a perfect right to do in foreign countries), but because plaintiff was the owner of the Leavitt patents covering such superheaters in this country, and was the exclusive licensee under the Sodeau patents covering the Armstrong improvements on the superheater for supplying the United States Government therewith, as applied to the only torpedoes then or now known. These patents gave the

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* This requirement plaintiff attempted to comply with in the second amended petition. See Pet. Cert., pp. 35-36, sub-par. (*c*), where the additions appear in italics.

exclusive right to make, vend and use the superheaters (*Waterman* v. *Mackenzie,* 138 U. S., 252). The Government, buying torpedoes abroad containing these superheaters, would not bring them under the protection of the patents until they were (1) first purchased and delivered to the Government, so as to come into its possession; (2) imported into this country, so as to bring them within the territory covered by the patents, and (3) put into use by the Government in the manner contemplated by the patents, that is, for heating the compressed air for propelling the torpedo. Of the monopoly to make, vend and use, only the latter comes in question. Hence, if this were a case of infringement, the infringement would begin only after the acquisition of the torpedoes by the Government, their importation into this country, *and their use* in torpedoes by the naval officials. This is not a case of infringement, but a case of a license for the purpose of avoiding infringement. *The license right attaches then from the same date when, without the license, infringement would begin.* Hence, in the absence of any express agreement as to the precise date when the royalties should become due, so that an action could be maintained for their recovery, this date is as a matter of law to be determined as of *the date when* USE *within this country* (such as without a license would have been an infringement of the patent) *began.*

The averment in the petition is:

> "That subsequently (to June 17, 1907) defendant bought of Whitehead & Company, pursuant to said agreement, 50 torpedoes containing said superheater inventions, which were, as petitioner is informed and

believes, brought into the territory of the United States subsequent to June 1, 1908" (p. 6).

From this averment it is clear that the superheaters did not come within the United States until after June 1, 1908, and hence were not yet within the territorial operation of plaintiff's letters patent, and their *use* pursuant to license could not have begun until later. Plaintiff had no chose in action for the agreed license fee or royalty until after the license began to operate in defendant's favor (it might have been otherwise if some definite date for payment had been agreed upon). As June 1, 1908, was within six years prior to the filing of plaintiff's petition by which this suit was begun, the suit clearly is not barred by the statute of limitations.

Plaintiff is, in any event, entitled to recover under the Act of June 25, 1910.

The Court of Claims erred in dismissing plaintiff's petition because if plaintiff's suit cannot be maintained on the theory of contract, it is in part, at least, maintainable on the theory of tort. That is, as to all superheaters purchased or made by the United States since June 25, 1910, plaintiff has an action for infringement if it has not an action for royalties under contract. As to such superheaters subsequently acquired, if defendant did not agree to pay for them, it acquired them by infringement of plaintiff's patents. The petition recites the following superheaters since June, 1910, viz., for

180 torpedoes purchased March 29, 1911;
50 torpedoes purchased October 25, 1911;
100 superheaters made since April 13, 1915;

making a total of 330 superheaters, as to which plaintiff's claim would not be limited to an agreed royalty of $500, but could be maintained for as much as plaintiff could show was, in view of the value of the invention, "reasonable compensation," which is presumably the same as a "reasonable royalty."

> *Dowagiac Mfg. Co.* v. *Plow Co.*, 235 U. S., 641.

In the *Farnham* case this Court, in affirming the judgment of the Court of Claims dismissing a claim presented on the theory of implied contract, called attention to the fact that the period included extended five days after the approval of the Act of June 25, 1910, and said:

> "The judgment, however, should be without prejudice to the presentation of any claim the petitioner may have under the statute."

> *Farnham* v. *United States*, 240 U. S., 537.

Under this authority it is clear that so much, at least, of plaintiff's claim as rests upon superheaters acquired since the date of that Act may be maintained, and that the Court of Appeals should have safeguarded this right and not dismissed plaintiff's petition *in toto*.

In conclusion it is respectfully submitted that the decision of the Court of Claims was erroneous and should be reversed.

New York, February , 1920.

FRANK H. PLATT,
ARTHUR C. FRASER,
Counsel for Appellant.

SUPPLEMENT TO BRIEF

as to Matters Contained in Petition for Certiorari for Diminution of Record.

Inasmuch as appellant's Petition for Certiorari is renewed with leave of this Court, additional arguments based thereon are submitted, in anticipation of the grant of said petition.

Attention is called to paragraphs 8, 9, 10, 11 and 12 of the assignment of errors (see pp. 9-10 herein).

As to these matters the Court is asked especially to read the brief appended to the Petition for Certiorari (p. 60 thereof).

The Court of Claims had itself decided in this case that plaintiff's petition set forth a cause of action on contract.

Plaintiff's original petition (see Pet. Cert., p. 6, Appendix 1) was in effect demurred to by a motion to dismiss (Pet. Cert., p. 17, Appendix 2). The grounds for this motion were:

> "That no express contract to pay plaintiff the royalty claimed or any royalty for the 510 torpedoes alleged to have been purchased and made by defendant is shown.
>
> That, from the facts and things alleged in the petition, no contract to pay plaintiff the royalty claimed or any royalty for the 510 torpedoes complained of can be implied."

Turning now to the Record, we find (p. 1) the entry:

> "On December 4, 1916, the defendant's motion to dismiss was overruled."

No opinion was filed, but the necessary conclusion is that the Court of Claims found that the original petition did present a cause of action based upon contract.

That this decision sustaining the original petition is equally applicable to the amended petition is seen by comparing the original petition (Appendix 1, *supra*) with the amended petition (Rec., pp. 1-9). The differences between the two do not affect this question, but affect solely plaintiff's title to the Sodeau patents (viz., pars. 5-a to 5-h and the insertion of par. 10-a).

Thus the Court of Claims at the first interlocutory proceeding in this suit correctly decided that the suit was sustained by a proper recital of facts constituting a cause of action *ex contractu*. This question was never again argued. Further interlocutory proceedings related to questions of title concerning the Sodeau patents, until in the "Demurrer and Motion" filed June 2, 1917 (Rec., p. 13), the defendant introduced as ground of demurrer:

> "1. That the facts and things alleged in said petition do not make or constitute any cause of action against defendant, nor any cause of action in which this court has jurisdiction."

As this question had already been argued and decided, and as three arguments had been had and several briefs filed on the other questions raised, the case was submitted to the Court on proofs under the circumstances stated in affidavit of Arthur C. Fraser (see Pet. Cert., p. 5). That appellee's counsel had the same understanding, see "Memorandum in Reply to Appellant's Petition for

Certiorari," pages 2-3. Plaintiff's counsel had no reason to apprehend that the Court would, without further argument, reconsider its own ruling of December 4, 1916, much less that the Court would reverse itself on this question.

The Court of Claims should have permitted the filing of the second amended petition.

It would appear from Rule 24 of the Court of Claims that a plaintiff might amend his petition "at any time before he has closed his testimony, without special leave." The last sentence, "Any subsequent amendments must be by leave of court," appears from the context to refer to amendments after closing the testimony, or after the trial. It is submitted, therefore, that plaintiff's second amended petition should have been placed on file.

As the new matter in this second amended petition is printed in italics (Pet. Cert., pp. 25-44), the changes thereby made may be readily perceived. The principal changes are:

As more fully showing the recognition of plaintiff's patents by the Government, its adoption and repeated purchases of the Bliss-Leavitt torpedo containing the patented superheater are recited.

As showing the importance of the superheater invention, the increases in speed and range of the torpedo due thereto are stated in detail (par. 3).

To more fully emphasize the importance of the underlying Leavitt patents, and the relation of the Sodeau patents thereto, the statements in paragraph 6 a are inserted.

In paragraph 9-a are stated the facts as to the approval by the United States of the superheater, its advantages, and the number of torpedoes purchased by the Government containing such super-

heaters. Also, in paragraph 9-b, the precise relations of the parties are stated more in full.

To show more fully the facts concerning the importation of the first 50 Whitehead torpedoes, a more detailed recital thereof is given in paragraph 9-c.

And further, to avoid any possible misunderstanding of the allegations in the petition (such as the Court of Claims has fallen into in its opinion of December 3, 1917), the following is inserted at the end of paragraph 10, viz.:

> "And that all of said purchases, so far as concerns the superheaters in or adapted to . . Whitehead torpedo, and all of said manufacture of superheaters by defendant, have been with petitioner's consent and license and with the understanding and expectation by petitioner that petitioner should receive therefor its royalty for said superheaters as hereinbefore stated."

In short, the opinion of the Court of Claims indicated that that Court had misunderstood plaintiff's petition by reason of its brevity and conciseness as a pleading, and to more effectually correct and avoid such misunderstanding and make unmistakably clear the intent of the pleading, the averments thereof were considerably amplified in the second amended petition.

The second amended petition did not in any way vary or extend the cause of action, but merely stated more fully and clearly the matters originally more briefly averred in the original petition.

Even if the Court of Claims had found adequate reason for denying to plaintiff the privilege of so

fully amending its petition, it should at least have admitted such amendments therein contained as were in compliance with the order of Court entered December 3, 1917, namely, the more complete recital concerning the purchase and importation of 50 Whitehead torpedoes containing the superheaters in question (par. 9-c).

The Court of Claims erred in penalizing plaintiff by reason of a merely technical default.

The final judgment is based (Rec., p. 26) on plaintiff's not having complied with the order of December 3, 1917, to make the petition more specific as to certain items of the claim. The order required that the petition be thus amended by January 15, 1918. Because of the death of plaintiff's attorney of record, Mr. L. S. Bacon (who lay mortally ill on December 3, 1917, and died three days later), and because no notice was given to the New York counsel for plaintiff, plaintiff through its counsel received no notice of this order and did not in fact learn of the order until January 29, 1918 (Affidavit, Pet. Cert., pp. 22-24). The second amended petition was presented February 18, 1918, with a motion for leave to file, and an affidavit fully stating why it had not been filed within the required time (Pet. Cert., pp. 21-24). On this showing the default should have been opened and leave to file granted.

The Court of Claims should have granted plaintiff's petition for rehearing on the showing made.

This petition for rehearing (Pet. Cert., p. 49, Appendix 8) speaks for itself. It shows clearly

that the Court's dismissal of plaintiff's petition as not stating a cause of action *ex contractu* was erroneous. Also, that the Court's conclusion that it rested upon plaintiff's title to the Sodeau patents was erroneous. Also, that plaintiff's title to the Sodeau patents was sufficient to sustain a claim based upon contract. In short, the petition for rehearing showed that the Court of Claims had proceeded upon a wholly erroneous understanding of plaintiff's claim as set forth in its pleading, and upon such showing the Court should have granted a rehearing in order that it might have been set right as to questions of both law and fact by a reargument.

The Court of Claims based its dismissal of the petition for rehearing upon its Rule No. 90, which is entitled "New Trial" and relates to its "findings of fact or its conclusions" (evidently on final hearing), and says:

> "Motions for new trial, except as provided by section 1088 of the Revised Statutes (sec. 175 of the Judicial Code), shall be filed within sixty days from the time the judgment of the court is announced."

But this rule appears from its text to be limited to a final judgment and not to include an interlocutory order on a demurrer or motion. Plaintiff's counsel so interpreted it. Even if this interpretation is deemed incorrect, the slightly longer delay (eighteen days) might well have been excused (as the defendant was not thereby prejudiced) in view of the showing made that the Court had incorrectly applied the well established law.

IT IS SUBMITTED that the amplified record contained in the appendices to the Petition for Certiorari strengthens the showing made by the certified record and that, if admitted by this Court, all of appellant's assignments of error are supported.

ARTHUR C. FRASER,
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CONTENTS.

	Page.
Statement	1
The contentions of the parties	2
The petition shows that appellant possesses no interest in the Armstrong patents	3
There was no contract as to the first 50 superheaters purchased from Whitehead Co., as there was no meeting of the minds	7
There was no contract as to the 360 torpedoes subsequently purchased	13
There was no contract as to the 100 torpedoes manufactured by defendant	14
Cases cited by appellant to support its contention that contract existed are distinguishable from case on appeal	15
Appellant bases its suit on the Armstrong patents and not on the Leavitt patents	18
The instrument whereunder appellant claims title in the Armstrong patents is, if any, a mere limited license	19
An exclusive license is not an assignment	23
A licensee can not sublicense others unless the right is expressly granted	24
Licensee can not maintain an action for infringement	25
The Court of Claims properly required appellant to state more definitely the terms of any contract relied upon and relating to the 50 superheaters purchased and when said 50 superheaters were purchased	26
The Court of Claims' refusal to admit second amended petition was proper	28
Court of Claims' denial of petition for rehearing was proper	31
Conclusion	32

To the original petition filed, defendant brought a motion to strike out certain paragraphs thereof. After hearing on this motion the Court of Claims ordered appellant to file a copy of the instrument under which title in the Armstrong patents is claimed. In compliance with this court order appellant filed an amended petition and appended to it, as Appendix A, what purported to be an agreement between E. W. Bliss Company and Armstrong & Company. To this amended petition defendant demurred and filed a motion to dismiss the same. The court sustained the demurrer and motion to dismiss and dismissed the petition, from which ruling appellant takes this appeal. No testimony was taken by either party and the Court of Claims heard the case on amended petition, demurrer, and motion.

THE CONTENTIONS OF THE PARTIES.

Appellant contends that the allegations of the amended petition show a contract between appellant and the United States for the purchase of superheaters from Whitehead & Company of England; that appellant, as assignee under the Armstrong patents, had the right to make such a contract, as well as to bring suit for infringement; that defendant broke the contract; and that defendant infringed the Armstrong patents in which appellant claims to have such title as to enable it to sue for infringement. Defendant contends on the other hand that it is impossible to find in the petition allegations sufficient for an action in contract; that appellant had no right to make such a contract; that there

was no contract; and further, that appellant is, at best, merely a licensee under the Armstrong patents, and therefore has no right to sue for infringement.

According to the allegations of the petition, appellant is a corporation of the United States engaged in the manufacture of Bliss-Leavitt torpedoes; Armstrong, Whitworth & Company (which is referred to as Armstrong & Company throughout the case) is an English company which owns the Armstrong patents in suit, which patents are referred to by appellant as Sodeau patents; Whitehead & Company is an English company engaged in the manufacture of "Whitehead" torpedoes.

Defendant purchased 410 torpedoes containing superheaters from Whitehead & Company of England. Defendant also manufactured 100 torpedoes containing superheaters. Appellant claims that defendant purchased 50 of the 410 torpedoes from Whitehead & Company under a contract for said purchase with appellant and has failed to pay to appellant the royalties contemplated by the contract; and that the use of the remaining 460 torpedoes was an infringement of the Armstrong patents "owned" by appellant. For this alleged breach of contract and infringement appellant seeks recovery.

THE PETITION SHOWS THAT APPELLANT POSSESSES NO INTEREST IN THE ARMSTRONG PATENTS.

It is alleged that appellant acquired the rights of an assignee in the *eight* Armstrong patents recited in the petition, but it is clear that appellant acquired *no* rights in said patents.

The agreement by which Armstrong & Company is alleged to have vested said rights in appellant is made a part of the amended petition and recites (pp. 15 and 16) that:

> 1. Whereas the Armstrong Co. are the sole owners of *an invention* provisionally protected in England by a specification No. 25003 deposited on the 17th day of November, 1904, for "Improvements in or relating to a method and means for increasing the work obtainable from a charge of compressed air more particularly applicable to the propulsion of torpedoes and the like"; and whereas the Armstrong Co. proposes to apply for *a* patent in the United States of America covering the same subject matter and desires to grant to the Bliss Co. an exclusive license to use the *said inventions* in connection with the Bliss-Leavitt torpedo manufactured by the Bliss Co. upon the terms and for the purposes hereinafter expressed, and the Bliss Co. desires to acquire such license,
>
> It is agreed as follows:
>
> 2. The Armstrong Co. hereby grants unto the Bliss Co. and their assigns the sole and exclusive license and authority to use and exercise the said inventions under *the said Letters Patent* for the whole period of the term to be granted by the said Letters Patent and any extension of the said term in the manufacture of apparatus for heating compressed air for the purpose of propelling Bliss-Leavitt torpedoes wherever sold by the

Bliss Co., and Whitehead torpedoes sold only to the United States Government. [Italics ours.]

The agreement merely states that Armstrong & Co. owns a British patent protecting *an invention*, and that the Armstrong Co. proposes to apply for *a* United States patent covering the same subject matter and desires to grant to the Bliss Company an exclusive license to use *said inventions* (the words *invention* and *inventions* are obviously interchangeably used). No United States patents are identified in the agreement, as none were in existence when the agreement was made.

The granting clause of the agreement quoted gives the license to the Bliss Company in "*said Letters Patent,*" and this must be construed to mean the proposed United States *patent* referred to in the preceding paragraph of the agreement if the expression is to have any meaning at all; but appellant claims that this agreement vests in it such title to the *eight* Armstrong patents recited in the petition as to enable it to maintain an action for infringement.

The point is that no United States patents are identified in the agreement and only *one* is referred to. How appellant can possibly claim that the *eight* Armstrong patents are *a* United States patent referred to in the agreement is beyond comprehension. Therefore, from the agreement it appears that the Bliss Company has no interest in the *eight* Armstrong patents.

Appellant alleges in the amended petition (p. 3):

> (b) That said instrument (Appendix A—insert ours) was entered into in contemplation of an application for patent in the United States covering the same subject matter, and in due course two such applications for patent were filed and the following Letters Patent granted thereon to said Armstrong Company as the assignee of said William H. Sodeau (assignments thereof having been duly recorded in the United States Patent Office), namely:
>
> No. 827,891, granted August 7, 1906, and No. 828,432, granted August 14, 1906;
>
> and that said Armstrong Company, upon the grant of said Letters Patent, notified petitioner thereof, and that said Letters Patent were for the same invention set forth in said English Specification No. 25,003 of the 17th of November, 1904.
>
> (d) That the effect of said written instrument was to grant unto petitioner and its assigns the sole and exclusive license and authority to make, use, and vend the inventions of said Letters Patent Nos. 827891 and 828432 for the whole period of the terms thereof, in the manufacture of apparatus for heating compressed air for the purpose of propelling Bliss-Leavitt torpedoes wherever sold by petitioner, and Whitehead torpedoes sold only to the United States Government.

These are mere conclusions by appellant and they rather weaken than strengthen its case, for in these very averments it alleges that the instrument contemplated *an application* and that subsequently

two applications were filed on both of which patents issued, and that these *two* patents are *a* patent referred to in the agreement. Appellant then assumes the position that because (in its opinion) the six subsequent Armstrong patents were improvements on the Leavitt patents, these *six patents* are also part of *a patent* referred to in the agreement.

This view, even as expressed by appellant, tends to show that appellant has *no interest* in the eight Armstrong patents.

If appellant acquired any interest whatever in these eight patents in suit, and it was a mere limited license (as will be fully discussed hereinafter), and as such licensee appellant has insufficient title either to sue for infringement or enter into a contract for the payment of royalties.

Regardless, however, of the insufficiency of appellant's title and its consequent inability to sue or contract under the patents, it is clear upon the allegations that no contract between appellant and the United States existed.

THERE WAS NO CONTRACT AS TO THE FIRST FIFTY SUPERHEATERS PURCHASED FROM WHITEHEAD COMPANY FOR THERE WAS NO MEETING OF THE MINDS.

The events (Amd. Pet., par. 9) recited as leading up to the purchase of the first *fifty* torpedoes containing the superheaters from Whitehead & Company clearly show that there was no contract for the payment of "royalty" by defendant to appellant. The petition shows that defendant was endeavoring to obtain torpedoes and that it was aware of the fact

that appellant owned certain torpedo patents. Knowing this defendant simply requested appellant to furnish a list of its patents covering the Bliss-Leavitt torpedoes, nothing being said as to any superheaters. Defendant alleges (Amd. Pet., par. 9):

> That on or about October 18, 1906, the defendant through its Bureau of Ordnance of the Navy Department, in written communications, bearing said date, requested a list of petitioner's patents covering the *Bliss-Leavitt* torpedo and the amount of royalty which petitioner would charge defendant for the use thereof. That on or about November 24, 1906, petitioner furnished such list in writing *which included said superheater patents.*

This was merely an attempt by defendant to forestall patent disputes arising from defendant's acts, by inquiring in advance as to what patents appellant might own. Obviously no contract was created by this attempt—a mere inquiry—as said by the Supreme Court in *Russel* v. *United States* (182 U. S. 516) viz:

> The prudence which takes a bond against a claim can not be said to constitute or raise a contract in favor of the claim—can not be said to have *intended* to create the liability which was meant to be forestalled (p. 535). (Italics ours.)

It is alleged that this list was furnished and included some superheater patents. (Amd. Pet., par. 9.) Furthermore appellant alleges:

> That subsequently, and on or about June 14, 1907, defendant, by telegraph, requested permission of petitioner to purchase a limited

> number of torpedoes from Whitehead & Company, an English corporation, *containing said superheater inventions.*

From the succeeding allegations it appears (Amd. Pet., par. 9) that after this request and appellant's reply that it "desired to render every assistance to the Government on a proper business basis," a conference took place between Admiral Mason of the Bureau of Ordnance, Navy Department, representing the defendant, and officers of appellant company. Appellant alleges that at this conference—

> * * * it was agreed between them that the Government might purchase not more than 100 torpedoes from Whitehead & Company, the amount of the royalty for the use therein of said superheater inventions to be later settled and agreed upon by the defendant and petitioner. (Amd. Pet., par. 9.)

This allegation shows that there was no agreement as to the payment of royalty by defendant to appellant and that the whole question of whether or not defendant would pay any royalty to appellant was left open. The later decision of defendant not to pay any royalty to appellant is not inconsistent with the allegation, clearly showing, on the other hand, that no contract came into existence at the time the conference referred to took place.

About November 9, 1907, appellant alleges that defendant, by letter from its Bureau of Ordnance, stated to appellant that "The bureau desires to take the subject of royalties under consideration for final settlement and requests that the company will submit

proposals * * *." Then on November 25, 1907, it is alleged that appellant stated, by letter, that:

> Referring to your letter of November 9th, in regard to royalties on Bliss-Leavitt torpedo, and in confirmation of verbal proposition made by the officers of this company to you at Sag Harbor a few days ago, beg to state that we consider the following royalties and prices to be fair. * * * (3) Royalty to be paid by the Government for the manufacture of superheaters for installation in Whitehead or other type of torpedo, five hundred dollars ($500.00). (4) Price to be paid for superheaters manufactured by E. W. Bliss Company and installed by the Government in Whitehead or other type of torpedoes, six hundred fifty dollars ($650.00). (Amd. Pet., p. 9.)

This proposal, it is alleged, was then considered by the Torpedo Board of the United States Government on December 3, 1907, and appellant was heard at that time by the board, but no decision by the board was given, nor was *any* written or oral agreement made as to the payment of any royalty.

Appellant alleges that subsequent to June 1, 1908—after the hearing before the Torepedo Board—50 torpedoes containing the superheater inventions "were brought into the United States," having been purchased by defendant from Whitehead & Company of England. Subsequently and at divers times defendant purchased torpedoes, containing superheaters, from appellant and paid for them at the rate of $650

each. *These were complete and independent transactions, entirely outside of any patent rights* (*Bauer & Cie* v. *O'Donnell*, 229 U. S. 1) *and have absolutely no bearing on the present case.* They are irrelevant facts sandwiched into the petition apparently to becloud the issue. It seems, granting *arguendo* the allegations of the petition, that *there was an offer* to permit defendant to install superheaters in Whitehead torpedoes at $500 each, leaving out of consideration whether or not appellant had any right to give said permission. This offer, after being made, was discussed by appellant and defendant in the manner above set forth, the former attempting, after the offer was made, to show that it was not unreasonable in spite of the fact that for $150 more than the so-called "royalty" appellant manufactured and delivered the superheaters to defendant. *The offer was not accepted.* It appears that there was a mere general discussion concerning "royalties" and appellant has not set forth a single fact in its petition which will permit the inference to be drawn that there was a "meeting of the minds" as to the payment of *any* "royalty." Defendant merely stated, in effect, that it wished to purchase a limited number of torpedoes from Whitehead & Company and appellant stated that it "*might*" purchase not more than one hundred. It does not appear from the use of this term "*might*" as appellant alleges it to have been used in the negotiations, whether it had reference to an event which possibly would happen, or whether

it is intended as a granting term. The ordinary interpretation would be that it defines an event which may or may not happen at some future time. The following section taken from the petition is significant (Amd. Pet. pp. 10, 11):

> Defendant repeated its request of December 20, 1910, for a reduction of the five hundred dollars ($500.00) royalty * * * and petitioner has never consented to the use of said patented inventions or said patented improvements thereon or any of them by defendant without payment of said royalty of five hundred dollars ($500.00) each.

Appellant shows conclusively by this allegation that at no time had the offer been accepted; that defendant was still negotiating; that there was no "meeting of minds," and that there was, therefore, no contract such as would entitle appellant to maintain his suit in the Court of Claims. As stated in *Russell* v. *United States, supra*, at page 530:

> This court has held that under the act of March 3, 1887, 24 Stat. 505, c. 359, defining claims of which the Court of Claims had jurisdiction, the court had no jurisdiction of demands against the United States founded on torts. *Schillinger* v. *United States*, 155 U. S. 163; *United States* v. *Berdan Fire-Arms Co.*, 156 U. S. 552. In other words, to give the Court of Claims jurisdiction the demand sued on must be founded on a convention between the parties—a coming together of minds.

THERE WAS NO CONTRACT AS TO THE 360 TORPEDOES SUBSEQUENTLY PURCHASED.

In paragraph 10 of the amended petition appellant avers:

> 10. That in addition to the 50 torpedoes purchased by defendant from Whitehead & Company, as set forth in the preceding paragraph of this petition, defendant has purchased from the same company other torpedoes containing some or all of said patented superheater inventions and improvements, namely, 130 torpedoes on or about July 7, 1908; 180 torpedoes on or about March 29, 1911; and 50 torpedoes on or about October 25, 1911.

The allegation (Amd. Pet., par. 9) that the royalty of $500 was agreed upon as to the 50 torpedoes containing superheaters, does not extend to the 360 torpedoes mentioned in paragraph 10. From the allegation of the petition it appears that defendant bought the 360 torpedoes from Whitehead & Company (Amd. Pet. par. 10), and that Whitehead & Company had a right to sell Whitehead torpedoes with superheaters installed therein to all but the United States Government (Amd. Pet., par. 10–a.). Defendant bought from Whitehead & Company in direct antagonism to appellant for the negotiation between appellant and defendant extended only to 100 torpedoes. (It is alleged that only 50 of this 100 were bought.) And it is not averred that defendant purchased the 360 torpedoes with appellant's consent. In fact it is to be inferred that the purchase

was made without even consulting appellant and with utter disregard for any rights which appellant might have had or might have claimed. This view is borne out by appellant's averment that it never consented to the use of the patented inventions or patented improvements thereon or any of them by defendant without payment of said royalty of $500. (Amd. Pet., par. 9.) Of course, even if the allegation be considered as including, not only the first 50 torpedoes bought, but also the 360 subsequently bought, appellant would stand in no better position with respect to the 360 than it does to the 50. Since there was no contract as to the 50, there could be no contract as to the 360. However, the negotiations extend only to the first 50 purchased.

THERE WAS NO CONTRACT AS TO THE 100 TORPEDOES MANUFACTURED BY DEFENDANT.

Appellant was not consulted when defendant made the 100 torpedoes with superheaters therein. They were made regardless of any right which appellant might have had. Clearly there was no contract as to the 100 torpedoes manufactured by defendant nor is it even averred by appellant that there was any. Appellant merely avers (Amd. Pet. p. 11):

> That in addition, defendant has made since April 15, 1913, or is engaged in making, 100 superheaters in the United States which contain said patented superheaters and said patented improvements thereon or some of them.

There is no averment of any contractual relation.

CASES CITED BY APPELLANT TO SUPPORT ITS CONTENTION THAT CONTRACT EXISTED ARE DISTINGUISHABLE FROM CASE ON APPEAL.

Appellant (brief, p. 16) cites four cases in support of its contention that a contract existed between appellant and defendant, but the cases are not in point and are readily distinguished from the case at bar.

United States v. *Palmer*, 128 U. S. 262 (erroneously cited by appellant as *Palmer* v. *United States*, 128 U. S. 662).

In this case a board was appointed to consider proper equipment for infantry soldiers and to recommend the adoption of the equipment best suited. Plaintiff submitted his patented improvements to the board and the board "*recommended the adoption of said improvements by the Government for the use of the Army of the United States*" (pp. 262–263). Thereafter the Secretary of War in an order stated "*the report of the board is approved*" (p. 263). It appears that plaintiff offered the use of his invention to the Government and that there was a clear expression of acceptance by the report of the board and the order of the Secretary of War—a meeting of the minds. The case is thus distinguished from the case at bar for in the latter case the Torpedo Board (which considered appellant's offer) did not recommend the use of appellant's alleged invention nor did it express any intention to so recommend. There was no meeting of the minds. The fact that appellant in the case at bar subsequently used *some* superheaters does not bring the case within the rule of the Palmer case, for

there was no acknowledgment that the superheaters were those of appellant's alleged patents.

McKeever v. *United States*, 14 Ct. of Cl. 396.

In this case plaintiff submitted his invention to the Ordnance Department. The *invention was recommended by a military board* and *adopted by the Secretary of War*. Thereafter the Ordnance Department manufactured the invention. The court found a contract existed as there was an offer and an express acceptance in the adoption by the Secretary of War—a meeting of the minds. But in the case at bar there was no recommendation and there was no adoption such as occurred in the McKeever case and the cases are thus distinguishable.

United States v. *Berdan*, 156 U. S. 552.

The invention was submitted to the War Department and the *Chief of Ordnance informed* (p. 568) *plaintiff that the officers expected to recommend the payment for the use of any of plaintiff's patented features.* Thereafter the War Department requested the Secretary of Interior to expedite plaintiff's patent application. (This is done when the Government is particularly interested in an application.) Here, too, there was an expression of intention to pay and an acknowledgment of the invention and *of its adoption.* In the case at bar there was no expression of intention to pay, nor was there any acknowledgment that any invention owned by appellant had been or would be used.

Societe Anciens Establissements v. *United States*, 224 U. S. 309.

In this case there was a voluminous correspondence between the War Department and various persons interested in the invention and in a report the Chief of the Bureau of Ordnance recommended that the department investigate the DeBange patent (plaintiff's patent) and if found valid that a sum for its use be recommended to be paid. The device of the patent was used and it was acknowledged that the use was of the patented device. The court said: "The record shows that compensation was contemplated." The facts are different from those of the case at bar for there was no recommendation that any royalty be paid—not even contingent upon the validity of the patent—nor was there any acknowledgment that the invention to which appellant alleges it has title, was used. The case does not fall within the rule of the *Societe Anciens Establissements case.*

The case on appeal, therefore, is not within the rule of any one of the cases cited by appellant and discussed above, but clearly is within the rule of *Schillinger* v. *United States* (155 U. S. 163); *Harley* v. *United States* (198 U. S. 229); *Russell* v. *United States* (112 U. S. 516) (also cited by appellant, p. 16, brief), for the use of the superheater by defendant was with total disregard for any rights appellant may have had in the patents in suit or any other patents. The Government was clearly hostile to the claims of appellant. The torpedo board did not recommend the adoption of any device in which appellant had any interest. There was no acknowledgment that the device alleged to have been used by defendant was the device covered by patents to which appellant alleges to have title.

APPELLANT BASES ITS SUIT ON THE ARMSTRONG PATENTS AND NOT ON THE LEAVITT PATENTS.

The averments of the petition show that appellant bases its claim upon the Armstrong patents which are alleged to cover the superheaters of the type included in the Whitehead torpedoes purchased or made by defendant. The Court of Claims properly said (p. 18, Trans. of Rec.):

> We shall assume that the plaintiff intends to claim that the Government is liable in contract or for infringement because of its purchase or manufacture or use of the device covered by the Armstrong patents or the improvements thereon, and for brevity we call the device "superheaters."

and further (p. 24, Trans. of Rec.):

> But the claim here is for superheaters in Whitehead torpedoes.

Two Leavitt patents, Nos. 693,871 and 693,872, are recited in paragraph 4 of the amended petition, and it is alleged that appellant acquired (par. 3 Amd. Pet.) title to these patents and that these patents cover "superheaters." These allegations are made in connection with the allegation that the Armstrong superheaters are improvements on the Leavitt superheaters and have no relation to any other allegations of the petition. No claim is made for any use under or infringement of the Leavitt patents. The claim is that defendant is liable in contract or for infringement because of its purchase or manufacture or use of the device *covered by the Armstrong patents.* The ownership of the Leavitt

patents can not affect in any way the question as to whether or not defendant is liable on contract. So far as the alleged contract is concerned the crucial question is whether the allegations show a meeting of the minds. That there was no meeting of the minds has been conclusively shown in the preceding part of this brief.

THE INSTRUMENT WHEREUNDER APPELLANT CLAIMS TITLE IN THE ARMSTRONG PATENTS IS, IF ANY, A MERE LIMITED LICENSE.

Appellant contends that it is an assignee under the Armstrong patents, but this is not a fact; it is, at best, a licensee, and it is not conceded that appellant has even so much as a licensee's interest in the Armstrong patents. If appellant has any interest in these patents it is derived from the agreement, Appendix A, and it is submitted that this agreement could be no more than a license and one, moreover, of a very limited scope. This is shown by:

(1) Its description as "Agreement."

(2) The intent as expressed in clause one, viz:

> * * * the Armstrong Co. * * * desires to grant to the Bliss Co. an exclusive *license* to use the said inventions in connection with the Bliss-Leavitt torpedo manufactured by the Bliss Co. upon the terms and for the purposes hereinafter expressed, and the Bliss Co. desires to acquire such *license*.

(3) The granting clause (clause 2):

> 2. The Armstrong Co. hereby grants unto the Bliss Co. and their assigns the *sole and exclusive license* and authority to *use and*

> *exercise* the said inventions under the said Letters Patent for the whole period of the term * * * in the manufacture of apparatus for heating compressed air for the purpose of propelling Bliss-Leavitt torpedoes wherever sold by Bliss Co., and Whitehead torpedoes sold *only* to the United States Government. [Defendant's italics.]

(4) The constantly recurring references in the instrument itself to the grant of a *license*.

(5) The provision that all fees, costs, and expenses of "maintenance and protection of any patent * * * obtained or to be obtained under these presents shall be paid and borne by the Armstrong Co."—the owner and grantor. (Clause 3.)

(6) The provision of clause 11 (Appendix A) that in case of infringement of the patent—

> * * * the Armstrong Co. shall forthwith, after notice of such infringement, *at their own cost, take all necessary proceedings for effectually protecting and defending the same.* (Italics ours.)

and in case of their default in so doing the Bliss Co. may, upon notice, determine the agreement.

Referring to point (3) above, the granting clause, it is noted that far from granting the monopoly secured by the patents, it is obvious that this instrument grants no rights whatever *in the patents*, but merely grants a right to "use and exercise" the *invention*. The distinction between a right to the monopoly secured by the patent (the right to prohibit others) which puts the grantee or assignee upon equal

footing in the patent with the patent owner, and a mere right to use or sell articles embodying the invention, expresses the fundamental difference between an assignee and a licensee, as is well explained in Robinson on Patents. (Vol. II, secs. 753–759, pp. 508–515.)

Furthermore, even the use of the inventions so conveyed is limited to (a) "the purpose of propelling *Bliss-Leavitt torpedoes.*" (b) *Whitehead torpedoes,* and (c) Whitehead torpedoes sold *only* to the United States Government. In other words, the right given to use the invention is itself *restricted to use in two particular kinds of torpedoes* and no right is given to use the inventions in torpedoes generally. By such license *the patent owners* have reserved to themselves (in that they have not granted) all rights to use the inventions of the Armstrong patents (so far as these patents may be held to be included in this instrument) in *all other makes of torpedoes* than the particular ones specified.

And in addition to being limited to particular types of torpedoes the grant is still further limited, so far as the present suit is concerned, to a right to sell the superheaters in Whitehead torpedoes "*only* to the United States Government." That is to say, the grant is limited under this instrument to the use of the patented superheaters in Whitehead torpedoes sold *only* to the United States Government. (It will be remembered that the torpedoes sought to be recovered upon are Whitehead torpedoes.)

Obviously, these limited rights thus granted are far short of being the whole or an undivided part of

the monopoly of the patent. Appendix A could be, therefore, merely a grant of rights for a restricted use and sale of the invention; i. e., a mere license.

Taking into consideration all of the above alleged facts it is quite clear that Appendix A was effective, if at all, to grant to appellant a mere *license or right to use the invention in a particular and limited manner and to restrict its sale in Whitehead torpedoes to the one customer—the United States Government*, far from being an assignment giving the plaintiff a right itself to grant licenses to others or to sue upon any patents referred to in the instrument. The instrument itself distinctly stipulates that whatever infringement suit be brought it shall be brought by Armstrong Company, the owner of the patent, which company also is to pay all costs, expenses, etc., for the "maintenance and protection of any patent" referred to in the instrument.

By section 4884, Revised Statutes, the right granted by a United States patent is a grant—

> of the exclusive right to make use and vend the invention or discovery throughout the United States and the territories thereof.

While these rights are each distinct and substantive rights (*Bauer* v. *O'Donnell*, 229 U. S. 1, 15), the monopoly granted is singular and indivisible (*Pope Mfg. Co.* v. *Gormully Mfg. Co.*, 144 U. S. 248; *Gaylor* v. *Wilder*, 10 How. 477); that is, in order to be an assignment enabling the assignee to sue in his own name, the monopoly of all these three substantive rights must be fully conveyed.

But the instrument, Appendix A, purports merely to grant the exclusive license and authority to make and exercise the invention, and assuming that this expression "make and exercise" includes the right to sell, it is clear that the right is limited to the sale of superheaters in Whitehead torpedoes *only to the United States Government.*

An exclusive license is not an assignment.

It is true that clause 2 of Appendix A employs the term "sole and exclusive *license,*" but it is equally true that it is exclusive only so far as the *rights of the grant* are concerned. In other words, it means that the licensor agreed not to grant the same rights to anyone else. It does not affect in any way the title to the patent which is retained by the licensor and does not prevent him from granting other licenses in so far as they are not inconsistent with the license already granted. The law is well settled that an exclusive license is not an assignment, and is well stated in *Hayward* v. *Andrews,* 106 U. S. 672, 674; *Mitchell* v. *Hawley,* 83 U. S.; 16 Wall 544; *Brush El. Co.* v. *California,* etc., 52 Fed. Rep. 945, 959, C. C. A.

As stated in Walker on Patents (p. 356, par. 296):

> It is a license, if it does not convey the entire and unqualified monopoly, or an undivided interest therein, throughout the particular territory to which it refers.

See also *Glover Sanford et al.* v. *Matthew Messer et al.*, 1 Holmes 149, 1872; *Wade H. Hill et al.*, v. *G. Henry Whitcomb*, 1 Holmes, 317, 1874; *Waterman* v. *Mackenzie*, 138 U. S. 252.

Robinson on Patents, referring to a license, in Vol. II, page 520, states:

> But if it leaves in the alienor any exclusive right whatever in the invention, or if the rights conferred upon the alienee are not exclusive rights vested in him alone or in him jointly with his alienor, the monopoly is not transferred and the conveyance is a license.

See also *Gamewell Fire Alarm Telegraph Co.* v. *City of Brooklyn* (1882), 14 Fed. Rep. 255.

A LICENSEE CAN NOT SUBLICENSE OTHERS UNLESS THE RIGHT IS EXPRESSLY GRANTED.

Appellant sold nothing to defendant, for none of defendant's superheaters was made by appellant; appellant attempted to grant defendant the right to buy superheaters or to make the same. This was obviously an attempt to sublicense defendant—something appellant had no power to do. The law is well settled that a licensee has no right to sublicense even when the license is assignable and is very tersely stated in *Brush El. Co.* v. *California, etc., supra* (wherein Mr. Justice McKenna was then sitting at circuit), as follows, page 964:

> Unless there is a manifest intent in the contract of license that the licensee is to have the power to divide up his license into parts, and assign such parts in severalty, *no such right*

> *exists.* Walk. Pat. 310. As a general rule, it may be said that a license is not divisible. * * * Considering this, I think the term "assigns," as used in the license under consideration in this case, must be construed as the right to assign the license as an entirety, *and not in parts* (citing *Brooks* v. *Byam*, 2 Story, 525). (Italics ours.)

If appellant acquired anything under the agreement, Appendix A, it was a *very limited license* which did not include the right to sublicense and which only extended so far as permitting it to sell superheaters in Whitehead torpedoes to the United States Government alone: a restriction of the *sale to one purchaser.*

LICENSEE CAN NOT MAINTAIN AN ACTION FOR INFRINGEMENT.

A suit for infringement contemplates the encroaching by one upon the patent rights secured to another. But a licensee has no offensive right in the patent but rather a defensive right not to be sued by the licensor. Logically, therefore, having no "patent rights" he has no right on which to base his suit. It is well settled that a licensee can not sue for infringement. Section 4919, Revised Statutes, *Gaylor et al* v. *Wilder*, 10 Howard 476; *Waterman* v. *Mackenzie*, 138 U. S. 252; *Pope Mfg. Co.* v. *Gormully*, 144 U. S. 248; *Birdsell* v. *Sahliol*, 112 U. S. 485; *Paper Bag cases*, 105 U. S. 766, 771. Appellant is a licensee and has no right to sue for infringement.

THE COURT OF CLAIMS PROPERLY REQUIRED APPELLANT TO STATE MORE DEFINITELY THE TERMS OF ANY CONTRACT RELIED UPON AND RELATING TO THE FIFTY SUPERHEATERS PURCHASED, AND WHEN SAID FIFTY SUPERHEATERS WERE PURCHASED.

While the following matters may not be properly before this court, appellant has raised them and it is encumbent upon defendant to discuss the same.

Section 165 of the Judicial Code reads:

> When it appears to the court in any case that the facts set forth in the petition of the claimant do not furnish any ground for relief, it shall not authorize the taking of any testimony therein.

The Court of Claims found that the facts set forth in the amended petition do not furnish any ground for relief as to the 460 torpedoes with superheaters therein, and was of the opinion (p. 23, Trans. of Rec., last paragraph but one) that sufficient facts were not set forth in the amended petition to show that there was a contract even for the purchase of said 50 superheaters. Under these circumstances, the court would have been justified in refusing permission to take testimony under section 165 of the Judicial Code above quoted, and in dismissing the suit. The court however, took the more lenient course and gave appellant permission "to amend and state more definitely, as it may be advised, the terms of any contract relied upon and relating to said 50 superheaters."

Under rule 18, Rules of the Court of Claims, which reads:

> 18. If upon the face of the petition it does not appear when the claim first accrued, the court may require the claimant to make the petition definite and certain, in that regard, and in default thereof may dismiss the suit.

the Court of Claims directed appellant "to make more specific and definite its allegations as to the time of purchase by the Government of said 50 superheaters." In this connection the court very properly said (p. 24, Trans. of Rec.):

> Construing the pleading more strongly against the pleader, as we might because of its vagueness be justified in doing, the conclusion could be reached that the purchase of the 50 superheaters in question occurred long before June 1, 1908, notwithstanding the indefinite date upon which they were "brought into the territory of the United States." Suit was instituted in this court by the original petition, filed May 29, 1914, and therefore only a few days prevents the bar of the statute if it commenced to run on June 1, 1908. It did commence to run when the claim first accrued, and "a claim first accrues, within the meaning of the statute, when a suit may first be brought upon it, and from that day the six years' limitation begins to run." Rice case, 122 U. S. 611, 617.

It was clearly within the discretion of the Court of Claims to dismiss the amended petition as it did not state when the claim accrued, and it did not

show that there was a contract as to the 50 superheaters. The court, however, gave appellant the benefit of the doubt and, instead of dismissing the petition, required amendment as to the two points. The court set a definite time in which the amendment could be filed and appellant failed to amend within that time.

THE COURT OF CLAIMS' REFUSAL TO ADMIT SECOND AMENDED PETITION WAS PROPER.

When the second amended petition was finally presented (February 8, 1918)—after the expiration of the time limit set—it contained many immaterial amendments not authorized by the court, and failed to make the definite allegations for the purpose of which this amendment was authorized. The court therefore properly refused permission to file the same.

The only amendment appearing in the Second Amended Petition which bears any semblance of compliance with the order of the Court of Claims is in the averment as to the time of purchase of the 50 superheaters. This averment is, however, very indefinite and misleading, and does not show when title passed to defendant. As the right of action, if any, arose when title passed, the Statute of Limitations started to run with the passing of title. Inasmuch as this averment is indefinite in this respect, it is not, in fact, a compliance with the court order. The Statute of Limitations is jurisdictional with the Court of Claims and therefore it was necessary for the court to know whether or not any claim

which could otherwise be made was barred by the Statute.

But the vital question is whether or not the Second Amended Petition shows facts sufficient to sustain a right of action leaving out of consideration any question of dates. The Second Amended Petition contains many immaterial amendments but fails for the same reason that the Original Petition and the first Amended Petition failed; that is to say, it shows that appellant is not an assignee under the Armstrong patents, and further that there was no contract between appellant and defendant as to the Armstrong superheaters. Therefore, the Second Amended Petition is subject to demurrer on the same grounds as those urged against the Original Petition and the Amended Petition.

Rule 30 of the Rules of the Court of Claims reads:

> If a demurrer be sustained, the claimant may, by leave of court, amend his petition within such time as the court may direct; but if he decline or fail to amend, judgment will be rendered dismissing the petition.

The Court of Claims in effect sustained the demurrer to the ~~second~~ amended petition as to the 50 superheaters and required appellant to amend his petition within a definite time, and ample authority is found in this rule for such a requirement. The court also had ample authority under this rule to dismiss the petition upon the failure to file the amended petition within the time set, and this it did. In connection with the refusal of the court to admit the second

amended petition, reference is made to the transcript of record which shows that after the filing of the original petition on May 29, 1914, defendant filed a motion to strike on April 12, 1916. By permission of the court appellant filed an amended petition on March 28, 1917, to which amended petition a demurrer and motion to dismiss were filed on April 7, 1917. After hearing on this petition, demurrer and motion, the court, on December 3, 1917, handed down a well-considered opinion sustaining defendant's demurrer and motion as to all of the items of claim for compensation set up in the amended petition, except the claim involved in the purchase of 50 Whitehead torpedoes containing superheaters. The court went so far as to permit amendment even after the filing of the amended petition and after this decision, so that if appellant had any grounds on which to stand as to the 50 torpedoes and superheaters, it would be permitted to state the same before January 15, 1918. This permission was entirely within the discretion of the court and inasmuch as appellant failed to comply literally with the permission, or to file the amendment within the time set, it can not now be heard to complain that the court abused its discretion in dismissing the entire petition.

It is respectfully urged that this court will not disturb the ruling of the Court of Claims in the enforcement of its rules and orders unless there is an absolute abuse of discretion. That there was no such abuse here, can not be denied. On the other

hand, the record clearly shows that the court permitted appellant to amend the original petition and even to amend the amended petition, showing the utmost patience in this respect.

COURT OF CLAIMS' DENIAL OF PETITION FOR REHEARING WAS PROPER.

Appellant filed a petition for rehearing and based this petition on the second amended petition, which was not filed. The Court of Claims very properly said in its denial of the motion for permission to file the petition for rehearing (p. 25, Trans. of Rec.):

> It appearing that the within motion and argument thereon deal with a proposed amended petition which has not been filed, and no sufficient reason being given for not applying for a rehearing within the time fixed by the rules of the court, the within motion for leave to file a motion for a rehearing is overruled.

This motion was in the nature of a motion for a new trial and was not filed within the sixty days from the time the judgment of the court was announced (Rule 90, Rules of the Court of Claims). The court found that appellant showed no sufficient reason why the motion was not filed within the time fixed by the rules, and therefore denied the motion. This is also a matter entirely within the discretion of the trial court and if the court is not permitted to enforce its rules, obviously the rules will be of no value.

CONCLUSION.

It is submitted that the allegations in the petition fail to support appellant's contention that a contract existed between the Government and the appellant. The petition also shows that appellant had no such interest in the Armstrong patents as would entitle it either to contract with or to maintain a suit for infringement against the Government, appellant being at best a mere licensee under the Armstrong patents.

Respectfully submitted.

FRANK DAVIS, JR.,
Assistant Attorney General.

EDWARD G. CURTIS,
DANIEL L. MORRIS,
Special Assistants to the Attorney General.

○

No. 7[redacted]240

FILED
DEC 16 1918
JAMES D. MAHE
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IN THE

Supreme Court of the United States

E. W. BLISS COMPANY,
Appellant,

vs.

THE UNITED STATES,
Appellee.

Appeal from the Court of Claims.

PETITION FOR CERTIORARI FOR DIMINUTION OF RECORD

AND

BRIEF THEREON.

ARTHUR C. FRASER,
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New York, N. Y.

The Hecla Press, 57 Warren St., N. Y. Tel. 6280 Barclay.

CONTENTS.

PAGE

PETITION FOR CERTIORARI for Diminution of Record 1

Verifying Affidavit 4

Appendices:

1. Petition to Court of Claims 6
2. Defendant's Motion to Dismiss 17
3. Defendant's Motion to Strike Out 18
4. Demurrer and Motion to Strike Out ... 20
5. Motion for Leave to File Second Amended Petition 21
6. Second Amended Petition 25
7. Motion for Leave to File Petition for Rehearing 45
8. Petition for Rehearing 49
9. Assignment of Errors 56

BRIEF in Support of Petition for Certiorari 60

IN THE

Supreme Court of the United States

E. W. BLISS COMPANY, Appellant, vs. THE UNITED STATES, Appellee.	Appeal from the Court of Claims.

Petition for Certiorari for Diminution of Record.

To the Honorable Justices of the Supreme Court of the United States:

The petition of E. W. Bliss Company, appellant, respectfully shows to this honorable Court that there is diminution of the record certified to this Court by the Court of Claims by reason of the omission therefrom of the following pleadings and proceedings, and the incorrect statement concerning the proceedings, namely:

1. Plaintiff's original petition, filed May 29, 1914 (at least, so much of this should be certified as to show wherein it differed from the amended petition filed March 28, 1917).

2. Motion by defendant to dismiss, filed April 12, 1916 (without this paper it does not appear what motion was overruled on December 4, 1916).

3. Defendant's motion to strike out, filed December 13, 1916 (this paper is necessary to show that this motion was on a specific ground, different from original motion to dismiss, filed April 12, 1916).

4. Demurrer and motion to strike out, filed April 7, 1917 (this paper is necessary to show the grounds of the demurrer and motion).

5. Motion, filed February 18, 1918, for leave to file second amended petition, with appended affidavit.

6. Second amended petition (referred to in said motion) which was presented to the Court February 18, 1918, but was not placed on file.

7. Motion for leave to file petition for rehearing (with statement that such motion was submitted to the Court February 19, 1918, but was not permitted to be filed until June 3, 1918), with appended affidavit.

8. Petition for rehearing, with a statement that this was presented to the Court February 19, 1918, with motion for leave, but was never permitted to be filed.

A copy of each of the foregoing papers or proceedings is hereunto appended.

9. Under "VI. Argument and Submission of Above Motion," the proceeding should be stated thus:

> On October 29, 1917, the defendant's demurrer to and motion to strike out certain para-

graphs of amended petition was submitted for decision on the briefs for both parties already filed.

WHEREFORE your petitioner prays that a writ of certiorari may be issued out of and under the seal of this Court directed to the Court of Claims of the United States, commanding the said Court to certify and send to this Court on a day certain to be therein designated, the full and complete transcript of all and every part of the record and proceedings of the said Court in the said cause therein entitled "E. W. Bliss Company v. The United States," No. 32,838, not embodied in the transcript on appeal in the said cause already filed in this Court, and specifically those papers and proceedings herein set forth under the above paragraphs, numbers 1 to 8, both inclusive.

Dated New York, December 13, 1918.

E. W. BLISS COMPANY,
Petitioner,
By its Attorney,
ARTHUR C. FRASER.

Verification.

STATE OF NEW YORK,
CITY AND COUNTY OF NEW YORK, } ss.:

ARTHUR C. FRASER, being duly sworn, deposes and says that he is the attorney for the E. W. Bliss Company, the appellant named in the foregoing petition; that he is one of the counsel who conducted the proceedings in this suit in the Court of Claims, and is familiar with all such proceedings; that upon taking the appeal from said Court, there was filed in said Court an assignment of errors, a copy of which is hereunto appended; that in deponent's judgment and opinion, the errors therein assigned are each and all such as should be examined and passed upon by the Supreme Court on the present appeal; that such errors each go to some part or all of the claim of appellant, which is the subject of said suit in the Court of Claims; that the transcript of record as certified from said Court of Claims omits pleadings, papers and proceedings which are required to be examined and must be in the record on appeal in order that the Supreme Court may pass upon the errors assigned; that with said appeal deponent filed in the Court of Claims a praecipe for record, which included each and all of the papers named in the foregoing petition as lacking in said transcript of record as certified; and that deponent verily believes that the inclusion of all of said papers is essential to the full hearing, understanding and determination of the points on which appellant's appeal is based.

The copies of the papers named in said petition, which are hereunto appended, are true and correct copies thereof.

As to the correction named in Paragraph 9 of the foregoing petition, deponent says the facts are that after three arguments before the Court had been had on November 21, 1916, February 23, 1917, and May 23, 1917, and after the filing of numerous briefs, it was understood and agreed between deponent and the Assistant Attorney General prior to the submission of the demurrer and motion to the Court on October 29, 1917, that this case would be submitted without argument. This agreement was contained in a letter from the Assistant Attorney General, dated October 8, 1917, saying, *inter alia*, "Defendant is willing to submit this case without argument if that is agreeable to plaintiff," and deponent's reply thereto, dated October 20, 1917, saying, *inter alia*, "Accordingly, and in view of your last letter, it is our understanding that the case will be submitted and that there will be no oral hearing on October 29." Deponent desires correction because the statement in the certified transcript that the matter "was argued and submitted by Mr. H. C. Workman for the defendants, counsel for claimant not being present" contradicts the agreement of counsel and makes it appear that deponent permitted the argument to go by default.

ARTHUR C. FRASER.

Sworn to and subscribed before me this 13th day of December, 1918.

T. F. WALLACE,
Notary Public,
New York Co., N. Y.

(Seal)

Appendix 1.

IN THE COURT OF CLAIMS.

E. W. BLISS COMPANY vs. THE UNITED STATES.	No. 32,838.

Filed May 29, 1914.

Petition.

To the Honorable the Judges of the Court of Claims:

The petition of the E. W. Bliss Company respectfully shows:

1. That petitioner is a corporation duly incorporated and existing under the laws of West Virginia, having its principal office in the Borough of Brooklyn, City and State of New York.

2. The petitioner is the maker and owner of the Bliss-Leavitt torpedo, which it has made for many years for the United States Government. That defendant, in addition to such purchase of torpedoes from petitioner, has also at various times, purchased torpedoes of Whitehead & Company, an English corporation, and has also itself made various parts of torpedoes in the United States.

3. That petitioner now is, and at all times since the grant and assignment to it of the letters patents hereinafter referred to has been the sole and exclusive owner of the invention and improvements

thereof covered by said letters patents. That the device or structure embodying said inventions is generally known as, and hereinafter will be designated as, a "superheater." That said superheater is a device whereby fuel is burned in the compressed air driving the motor by which the torpedo is propelled, so that the compressed air is heated to a high degree before its energy is utilized, and by means of which its energy is vastly increased.

4. That said superheater invention was covered by letters patent of the United States, No. 693,871, duly granted on February 25, 1902, to petitioner, as the assignee of the inventor, Frank M. Leavitt, of Brooklyn, New York, the assignment, dated December 21, 1898, having been duly recorded in the United States Patent Office on January 31, 1902, in Liber D, 64, page 467, of Transfers of Patents, and by letters patent of the United States, No. 693,872, duly granted on February 25, 1902, to petitioner, as the assignee of the inventor, Frank M. Leavitt, said assignment, dated January 23, 1902, having been duly recorded in the United States Patent Office January 31, 1902, in Liber D, 64, page 468, of Transfers of Patents.

5. That certain improvements in said superheater were covered by the following letters patent of the United States, duly granted to Sir W. G. Armstrong, Whitworth & Co., Limited, as the assignee of William H. Sodeau, of Newcastle-upon-Tyne, England, and of said William H. Sodeau and Edward W. Lloyd, said assignments having been duly recorded in the United States Patent Office:

No. 827,891, granted August 7, 1906;
No. 828,432, granted August 14, 1906;
No. 835,262, granted Nov. 6, 1906;
No. 850,307, granted April 16, 1907;
No. 944,975, granted Dec. 28, 1909;
No. 964,574, granted July 19, 1910;
No. 1,008,871, granted Nov. 14, 1911;
No. 1,009,024, granted Nov. 14, 1911.

That said patents were subservient to said patents Nos. 693,871 and 693,872 and could not be used in torpedoes without employing the invention covered by said last named patents.

That by written instrument duly executed and delivered on or about April 10, 1905, said Sir W. G. Armstrong, Whitworth Company, Limited, for a valuable consideration, duly assigned, transferred and set over to petitioner the sole, full and exclusive right, license and privilege of making, using and selling the said inventions covered by said letters patent, together with all future improvements therein or additions thereto in or for torpedoes for the use of the United States Government throughout the United States during the whole term of said letters patent.

6. That petitioner now is the owner as aforesaid of all the rights and privileges granted and secured or intended to be granted and secured in and by said letters patent, and has been such owner since the granting of said respective patents.

7. That the said Frank M. Leavitt was the true, original and first inventor of the said invention and improvements thereon patented in said letters patent, Nos. 693,871 and 693,872, that the same were not known or used by others in this country

before his invention or discovery thereof, and not patented or described in any printed publication in this or any foreign country before his invention or discovery thereof or more than two years prior to his application for said letters patent, Nos. 693,871 and 693,872, or either of them, and had not been in public use or on sale in this country for more than two years prior to his said respective applications. and which had not been abandoned to the public, and for which no application for a patent in a foreign country had been filed by the said Frank M. Leavitt or his legal representatives or assigns more than seven months prior to the filing of said application for said patent No. 693,871, or said application for said patent No. 693,872.

8. That the said William H. Sodeau was the true, original and first inventor of the improvements on said superheater patented in said letters patents Nos. 827,891; 828,432; 835,262; 944,975; 964,574; 1,008,871, and 1,009,024, that the same were not known or used by others in this country before his respective invention or discovery thereof and not patented or described in any printed publication in this or any foreign country before his respective invention or discovery thereof or more than two years prior to his respective applications for said letters patents Nos. 827,891; 828,432; 835,262; 944,975; 964,574; 1,008,871 and 1,009,024, and which had not been in public use or on sale in this country for more than two years prior to his said respective applications and which had not been abandoned to the public, and for which no application for a patent in a foreign country had been filed by the said William H. Sodeau or his legal representatives or assigns more than twelve months

prior to the respective filing of the applications for said patents Nos. 827,891; 828,432; 835,262; 944,975; 964,574; 1,008,871 and 1,009,024.

8a. That the said William H. Sodeau and Edward W. Lloyd were the true original and joint inventors of the improvements on said superheater patented in said letters patent No. 850,307, that the same was not known or used by others in this country before their said invention or discovery thereof and not patented or described in any printed publication in this or any foreign country before their said invention or discovery thereof, or more than two years prior to their application for said letters patent No. 850,307, and which have not been in public use or on sale in this country for more than two years prior to their said application and which had not been abandoned to the public, and for which no application for a patent in a foreign country had been filed by the said William H. Sodeau and Edward W. Lloyd, or their legal representatives or assigns, more than twelve months prior to the filing of the application for said patent No. 850,307.

9. That on or about October 18, 1906, the defendant through its Bureau of Ordnance of the Navy Department, in written communications, bearing said date, requested a list of petitioner's patents covering the Bliss-Leavitt torpedo and the amount of royalty which petitioner would charge defendant for the use thereof. That on or about November 24, 1906, petitioner furnished such list in writing, which included said superheater patents. That subsequently, and on or about June 14, 1907, defendant by telegraph requested permission of petitioner to purchase a limited number of torpedoes from Whitehead & Company, an English corpora-

tion, containing said superheater inventions. That petitioner on same day replied by telegraph that it desired to render every assistance to the Government on a proper business basis. That thereupon, and on or about June 17, 1907, the officers of petitioner conferred with Admiral Mason, Chief of the Bureau of Ordnance, at Washington, and it was agreed between them that the Gomernment might purchase not more than 100 torpedoes from Whitehead & Company, the amount of the royalty for the use therein of said superheater inventions to be later settled and agreed upon by the defendant and petitioner. That subsequently defendant bought of Whitehead & Company, pursuant to said agreement, fifty torpedoes containing said superheater inventions, which were, as petitioner is informed and believes, brought into the territory of the United States subsequent to June 1, 1908. That on or about November 9, 1907, defendant, through its said Bureau of Ordnance, by letter bearing said date, stated, "The Bureau desires to take the subject of royalties under consideration for final settlement and requests that the company will submit proposals covering the following points: * * * (b) Royalty to be paid by the Government for the manufacture of gyro and superheater for installation in Whitehead or other type of torpedo. (c) Price to be paid for superheaters and gyros manufactured by the E. W. Bliss Company and installed by the Government in Whitehead or other type of torpedoes." That thereupon petitioner replied by letter dated November 25, 1907, "Referring to your letter of November 9th, in regard to royalties on Bliss-Leavitt torpedo, and in confirmation of verbal proposition made by the officers of this company to you at Sag Harbor a few days ago, beg to state

that we consider the following royalties and prices to be fair. * * * (3) Royalty to be paid by the Government for the manufacture of superheaters for installation in Whitehead or other type of torpedo, five hundred dollars ($500). (4) Price to be paid for superheaters manufactured by E. W. Bliss Company and installed by the Government in Whitehead or other type of torpedoes, six hundred fifty dollars ($650)." That defendant, through its said Bureau, by letter dated November 29, 1907, acknowledged receipt of said letter of November 25, 1907, and stated that the matter would be laid before the Torpedo Board at its meeting on December 3, 1907, and invited petitioner to attend. That petitioner, by its executive officers, attended said meeting and explained the reasonableness of said royalty to the members of the Torpedo Board. That thereafter, and on or about June 4, 1908, by contract bearing said date, the defendant agreed to pay petitioner six hundred fifty dollars ($650) each, for twenty superheaters containing said patented inventions and improvements or some of them. That said contract was duly performed and the price paid. That defendant, on or about December 12, 1910, by letter bearing said date, referred to the superheater royalty specified in petitioner's letter of November 25, 1907, and requested a reduction thereof. That petitioner replied by letter dated December 20, 1910, declining to reduce the amount of said royalty. That thereafter, and on or about April 18, 1911, by contract bearing said date, petitioner agreed to furnish 75 superheaters containing said patented inventions and improvements or some of them to the Government at six hundred fifty dollars ($650) each. That said contract was duly performed and the contract price

paid. That defendant, by letter dated April 27, 1911, requested additional superheaters to replace ones on which the royalty had already been paid, and requested that for this reason, the price for these new superheaters be reduced. That accordingly, on or about June 16, 1911, by contract bearing said date, petitioner agreed to supply 100 superheaters containing said patented inventions and improvements or some of them at two hundred dollars ($200) each. That said contract was duly performed and the purchase price paid. That thereafter, and on or about March 13, 1912, by letter bearing said date, defendant repeated its request of December 20, 1910, for a reduction of the five hundred dollars ($500) royalty for superheaters. That petitioner by letter dated March 19, 1912, declined to grant any reduction and no reduction has ever been granted, and petitioner has never consented to the use of said patented inventions or said patented improvements thereon or any of them by defendant without payment of said royalty of five hundred dollars ($500) each.

10. That in addition to the 50 torpedoes purchased by defendant from Whitehead & Company, as set forth in the preceding paragraph of this petition, defendant has purchased from the same company other torpedoes containing some or all of said patented superheater inventions and improvements, namely, 130 torpedoes on or about July 7, 1908; 180 torpedoes on or about March 29, 1911; and 50 torpedoes on or about October 25, 1911. That in addition, defendant has made since April 15, 1913, or is engaged in making, 100 superheaters in the United States which contain said patented superheater and said patented improvements thereon or some of them.

11. That the fair and reasonable royalty for each of said superheaters is $500, which is also the stipulated and agreed royalty as above stated.

12. That petitioner on or about May 2, 1913, and at various other times, has demanded from defendant payment of said royalty of $500 for each of the 510 superheaters referred to in the preceding paragraphs of this petition, but defendant has wholly failed and neglected to pay any part thereof, and, by reason of the premises, the defendant is justly indebted to your petitioner in the sum of two hundred and fifty-five thousand dollars ($255,000), which sum is still due and unpaid.

13. That the petitioner is the sole owner of the claim set forth in this petition, no assignment or transfer of the said claim or of any interest therein having ever been made, and that petitioner is justly entitled to the amount herein claimed from the United States after allowing all just credits and offsets.

14. That no action upon your petitioner's claim has been had by or before Congress or any executive department of the Government except that petitioner brought the subject of its claim to compensation for the use of said invention by the United States to the attention of the Secretary of the Navy by letter of May 2, 1913, and that thereafter your petitioner was informed by the Assistant Secretary of the Navy that the necessary proceedings for the consideration and adjustment of said claim should be instituted in this Honorable Court.

15. That petitioner is as aforesaid a domestic corporation organized under the laws of West Virginia,

and that petitioner has at all times borne true allegiance to the Government of the United States and has not in any way voluntarily aided, abetted or given encouragement to rebellion against the said Government; that neither petitioner nor any assignee of petitioner's has at any time brought or has now pending in any court any suit or process against any other person, firm or corporation acting or professing to act mediately or immediately under the authority of the United States for or in respect of the claim herein presented.

16. That the facts stated in this petition are true.

Whereupon your petitioner asks judgment in its favor against the United States for the said sum of $255,000.

The petitioner's address is Brooklyn, New York. The address of its attorneys, Bacon & Milans, is 908 G Street, N. W., Washington, D. C.

E. W. BLISS COMPANY,
By F. C. B. PAGE,
Vice-President.

(Sgd.) L. S. BACON,
Attorney for Claimant.

FRANK H. PLATT,
ARTHUR C. FRASER,
Of Counsel.

EASTERN DISTRICT OF NEW YORK,
CITY OF NEW YORK,
BOROUGH OF BROOKLYN, } ss.:

F. C. B. PAGE, being duly sworn according to law, says that he is the Vice-President of the E. W. Bliss Company, the petitioner named in the foregoing petition; that he has read the said petition and knows the contents thereof, and that the facts stated in the said petition are true to the best of his knowledge, information and belief.

F. C. B. PAGE.

Sworn to and subscribed to before me this 28 day of May, 1914.

GEO. A. MURRAY,
(Seal) Notary Public No. 47,
Kings County,
New York.

[Filed May 29, 1914.]

Appendix 2.

IN THE

COURT OF CLAIMS OF THE UNITED STATES.

E. W. BLISS COMPANY v. THE UNITED STATES.	No. 32,838.

Motion to Dismiss.

Now comes defendant, by its Attorney General, and moves the Court to dismiss the petition, for that the same does not allege facts sufficient to constitute a cause of action against this defendant, nor any cause of action of which this Court has jurisdiction.

The grounds for the motion are:

That no express contract to pay plaintiff the royalty claimed or any royalty for the 510 torpedoes alleged to have been purchased and made by defendant is shown.

That, from the facts and things alleged in the petition, no contract to pay plaintiff the royalty claimed or any royalty for the 510 torpedoes complained of can be implied.

The Court is respectfully requested to set a time for an oral hearing of this motion and to make such order regarding filing and serving briefs thereon as may seem meet and just to the parties.

HUSTON THOMPSON,
Assistant Attorney General.

H. C. WORKMAN,
Attorney.

[Filed April 12, 1916.]

Appendix 8.

IN THE

COURT OF CLAIMS OF THE UNITED STATES.

E. W. BLISS COMPANY v. THE UNITED STATES.	No. 32,838.

Defendant's Motion to Strike Out.

Now comes defendant, by its Attorney General, and moves the Court to strike out from the petition the following, viz.:

Paragraphs numbered 5, 6, 8 and 8a on pages 2, 3, 5, and 5 of the printed petition.

The grounds for the motion are:

As shown in the petition, plaintiff is not the owner of any of the eight patents referred to in said paragraphs; that it has not the legal title thereto; that it is only a licensee with a limited license under said patents and has, therefore, no right to maintain this suit thereon.

As a further ground for the motion it is pointed out that the expense required to analyze separately each one of these patents and their several claims, to investigate the prior art as to each one of them, and the expert testimony required to bring the same before the Court and explain the nature, operation

and function of the several patents and of all the devices of the prior art found to be pertinent is so great—not to mention the expense of printing the same—that it should not be incurred if plaintiff has no title to sue thereon.

HUSTON THOMPSON,
Assistant Attorney General.

H. C. WORKMAN,
Attorney

[Filed December 13, 1916.]

Appendix 4.

IN THE

COURT OF CLAIMS OF THE UNITED STATES.

E. W. BLISS COMPANY v. THE UNITED STATES.	No. 32,838.

Demurrer and Motion to Strike Out.

Now comes defendant, by its Attorney General, and demurs to, and moves the Court to strike out of, the amended petition, paragraphs numbered 5 (*a*), (*b*), (*c*), (*d*), (*e*), (*f*), (*g*), (*h*), 6, 8, 8*a*, and 10*a* (pp. 2-8, 11-12).

The ground of the demurrer and motion is that plaintiff is not the owner of the letters patent, nor of any of them, specified in said paragraphs, particularly paragraphs 5 (*b*) and 5 (*c*), nor of any part thereof or of any right granted thereby; and that plaintiff has no right to sue thereon.

HUSTON THOMPSON,
Assistant Attorney General.

H. C. WORKMAN,
Attorney.

[Filed April 7, 1917.]

Appendix 5.

IN THE

COURT OF CLAIMS OF THE UNITED STATES.

E. W. BLISS COMPANY vs. THE UNITED STATES.	No. 32,838.

Motion for Leave to File Second Amended Petition.

Now comes plaintiff, E. W. Bliss Company, and asks leave of Court to file the accompanying second amended petition.

The grounds in support of the application are:

1. The amended petition is in part a direct compliance with the order of Court entered December 3, 1917, requiring plaintiff to make its petition more specific as to the claim involved in the purchase of 50 Whitehead torpedoes containing superheaters. This portion of the amended petition is contained in paragraph 9 (*b*) and (*c*).

2. The amended petition contains a more full recital of the relations and transactions between plaintiff and the defendant, represented by the Bureau of Ordnance of the Navy Department, showing or tending to show that defendant at all times recognized plaintiff's patents and plaintiff's title thereto, and the merit of the superheater inventions covered thereby, and never questioned either the value

of said inventions or the validity of said patents, or the sufficiency of plaintiff's title thereto, but contended only that the royalty fixed by plaintiff should be diminished.

3. The amended petition contains in paragraph 10 a more full recital of the facts concerning the subsequent purchases of Whitehead torpedoes containing said patented superheaters

4. Said amended petition introduces in paragraph 5 (*i*) a further allegation concerning the consideration tendered by plaintiff to the Armstrong Company concerning the rights derived by plaintiff from said Armstrong Company under the Sodeau patents.

The several amendments are intended to make a more full, clear and extended presentation in plaintiff's pleading of plaintiff's claim, in order that plaintiff's petition may be free from ambiguity and may lay a full foundation for a finding of fact on the pleading that plaintiff's claim is based upon a contract, express or implied, with the defendant.

Dated February 14, 1918.

E. W. BLISS COMPANY,
By its Attorney,
ARTHUR C. FRASER.

STATE OF NEW YORK,
CITY AND COUNTY OF NEW YORK, } ss.:

ARTHUR C. FRASER, being duly sworn, says:

I am of counsel for E. W. Bliss Company, plaintiff in this suit, and have had the active charge thereof. Plaintiff's attorney of record was L. S. Bacon, of Washington, D. C., who died December 6, 1917, after

an illness which, I am informed and believe, had incapacitated him from all business from a time prior to December 3, 1917. On learning of his death several days thereafter I caused an inquiry to be made at the Clerk's Office of the Court of Claims to see if any decision had been handed down in this case, and received in return printed copies of the Court's opinion of December 3, 1917, which reached me on or about December 14, 1917, but received no copy of any order, and I never learned that the order dated December 3, 1917, had been made until I received on January 29, 1918, a copy of such order which was sent me in response to an inquiry instituted by me. I then learned for the first time that the Court had required plaintiff's petition to be amended by January 15, 1918.

On receiving said opinion I at once sent a copy thereof to my associate and senior counsel, Frank H. Platt, Esq., and requested a conference with him. Not hearing from him, I learned shortly afterward that he was confined to his home by a serious illness which ever since has incapacitated him from conducting legal business.

On receiving said opinion I immediately took steps to procure the further information required to prepare amendments to plaintiff's petition as required by said opinion. I particularly asked information as to the dates of purchase, delivery, importation and use of the 50 torpedoes referred to in paragraph 9 of plaintiff's petition. On receiving said order on January 29, 1918, having not yet received such information, I wrote to the Assistant Attorney General asking that he procure for me such information, which I received from him on February 7, 1918. Meanwhile I was engaged in preparing amendments to said petition, the present

petition for leave and petition for rehearing, and a brief supporting the latter, which are about to be filed, all of which have been prepared as diligently as was practicable.

Until January 29, 1918, I was unaware that plaintiff was under any time limit in amending its petition. In all my practice for many years past in various courts, I have never heretofore known of an instance where a party was put under a limit of time under court order without a copy or notice thereof being served upon such party or his attorney. I now understand that this Court expects attorneys to attend and learn of such notices of such orders, and the failure to thus receive notice of said order I believe to be due to the death of plaintiff's said attorney, L. S. Bacon.

The delay in preparing, printing and filing the accompanying second amended petition has been due to the facts above stated, and to my previous engagements on other court cases, and to the intervention under war rulings of several non-business days, and to shortage of help owing to the war, and generally to circumstances beyond my control. Accordingly, the Court is petitioned to accept the said petition for filing notwithstanding that it is not filed within the time limited in said order of December 3, 1917.

ARTHUR C. FRASER.

Sworn to and subscribed before me this 14th day of February, 1918.

T. F. WALLACE,
Notary Public (19),
(Seal) New York County, N. Y.,
New York County Register's No. 9006.

[Filed February 18, 1918.]

25

Appendix 6

IN THE

Court of Claims

E. W. BLISS COMPANY vs. THE UNITED STATES.	No. 32,838.

Original Petition filed May 29, 1914.
First Amended Petition filed March 28, 1917.
Second Amended Petition filed February , 1918.*

SECOND AMENDED PETITION.

TO THE HONORABLE, THE JUDGES OF THE COURT OF CLAIMS:

The petition of the E. W. Bliss Company respectfully shows:

1. That petitioner is a corporation duly incorporated and existing under the laws of West Virginia, having its principal office in the Borough of Brooklyn, City and State of New York.

2. That petitioner is the maker and owner of the Bliss-Leavitt torpedo, which it has made for many years for the United States Government.

* The new matter introduced by this second amendment of the petition is herein distinguished by being in *italic type*.

This torpedo has been recognized and adopted by the Government and has always contained the superheater inventions hereinafter referred to, made under the letters patent hereinafter named. That defendant, in addition to such purchase of torpedoes from petitioner, has also at various times purchased torpedoes of Whitehead & Company, an English corporation, and has also itself made various parts of torpedoes in the United States.

3. That petitioner now is, and at all times since the grant and assignment to it of the Letters Patent hereinafter referred to has been, the sole and exclusive owner of the invention and improvements thereof covered by said Letters Patent. That the device or structure embodying said inventions is generally known as and hereinafter will be designated as a "superheater." That said superheater is a device whereby fuel is burned in the compressed air driving the motor by which the torpedo is propelled, so that the compressed air is heated to a high degree before its energy is utilized, and by means of which its energy is vastly increased, *so that a torpedo of a given size and having a compressed air flask or reservoir of a given capacity, containing air at a given pressure, and adjusted to travel at a given speed, has its range increased to at least two and one-half times, and, under the most improved engineering development, up to four times the range possible without such superheater. Said superheater is the principal element of the improvement whereby the Whitehead torpedo of a given size, and running at approximately 26 knots speed, has been increased in range from 1,000 yards to 3,500 yards. Said superheater has always been an important and distinguishing element of the Bliss-Leavitt torpedo, which, when first built, had*

at a speed of 27 knots a range of 3,500 yards, and in its later developments (prior to the beginning of the present action) had, at a speed of 28 knots, a range of 10,000 yards.

4. That said superheater invention was covered by Letters Patent of the United States No. 693,871, duly granted on February 25, 1902, to petitioner, as the assignee of the inventor, Frank M. Leavitt, of Brooklyn, New York, the assignment, dated December 21, 1898, having been duly recorded in the United States Patent Office on January 31, 1902, in Liber D 64, page 467, of Transfers of Patents, and by Letters Patent of the United States No. 693,872, duly granted on February 25, 1902, to petitioner, as the assignee of the inventor, Frank M. Leavitt, said assignment, dated January 23, 1902, having been duly recorded in the United States Patent Office January 31, 1902, in Liber D 64, page 468, of Transfers of Patents.

5. (a) That certain improvements in said superheater made by William Hollis Sodeau, of Newcastle-upon-Tyne, England, were acquired by Sir W. G. Armstrong, Whitworth & Company, Ltd. (hereinafter referred to as "Armstrong Company"), of the same place, and set forth in British Specification No. 25,003 of the 17th of November, 1904, and thereafter said Armstrong Company and petitioner did enter into a certain written instrument dated the 10th day of April, 1905, a true copy of which, marked "Appendix A," is hereunto annexed.*

(b) That said instrument was entered into in contemplation of an application for patent in the

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*Appendix A is printed with the Amended Petition, filed March 28, 1917, pages 15-19.

United States covering the same subject matter, and in due course two such applications for patent were filed and the following Letters Patent granted thereon to said Armstrong Company as the assignee of said William H. Sodeau (assignments thereof having been duly recorded in the United States Patent Office), namely:

No. 827,891, granted August 7, 1906, and
No. 828,432, granted August 14, 1906;

and that said Armstrong Company, upon the grant of said Letters Patent, notified petitioner thereof, and that said Letters Patent were for the same invention set forth in said English Specification No. 25,003 of the 17th of November, 1904.

(c) That said patents and each and all of the other subsequent patents hereinafter named were and are subservient to said patents Nos. 693,871 and 693,872, and could not be used in torpedoes without employing the invention covered by said last-named patents.

(d) That the effect of said written instrument was to grant unto petitioner and its assigns the sole and exclusive license and authority to make, use and vend the inventions of said Letters Patent Nos. 827,891 and 828,432 for the whole period of the terms thereof, in the manufacture of apparatus for heating compressed air for the purpose of propelling Bliss-Leavitt torpedoes wherever sold by petitioner, and Whitehead torpedoes sold only to the United States Government.

(e) That on the dates given below, the following Letters Patent of the United States were duly granted to said Armstrong Company as the assignee of said William H. Sodeau and of said William

H. Sodeau and Edward W. Lloyd (assignments thereof having been duly recorded in the United States Patent Office), viz.:

No. 835,262, granted November 6, 1906;
No. 850,307, granted April 16, 1907;
No. 944,975, granted December 28, 1909;
No. 964,574, granted July 19, 1910;
No. 1,008,871, granted November 14, 1911, and
No. 1,009,024, granted November 14, 1911.

(f) That pursuant to the provisions of Articles 8 and 10 of said written instrument (Appendix A), said Armstrong Company did from time to time communicate to petitioner the subjects-matter contained in and claimed by the several Letters Patent recited in the foregoing sub-paragraph (e), and did furnish petitioner with full information, drawings and designs concerning the same; and petitioner did thereafter adopt and incorporate in its Bliss-Leavitt torpedoes constructions of superheaters and appurtenances thereof (known as "outside superheaters" or "Armstrong superheaters") embodying wholly or in part the subjects-matter of said United States patents; and that petitioner upon so doing did notify said Armstrong Company to that effect and that royalties would be payable under said written instrument for such superheaters as sold to the United States; and that subsequently, upon making sales of said torpedoes containing said outside superheaters to the United States, petitioner did from time to time (as provided in Articles 4, 5 and 6 of Appendix A) account and pay to said Armstrong Company the royalties named in Article 4 of the said instrument for each and all of the torpedoes sold containing such outside superheaters; and said Armstrong Company did receive and accept and receipt for all of said royalties so paid.

(g) That it has been uniformly recognized and understood by and between said Armstrong Company and petitioner that the several United States Letters Patent named in this paragraph 5 are within and covered by said written instrument (Appendix A) as fully and effectively as if in terms recited therein; and that as respects said Letters Patent petitioner was entitled to and has enjoyed all the exclusive rights set forth in said written instrument; and that petitioner's rights under said written instrument concerning said patented superheaters for torpedoes have been exclusive of all others in so far as concerns Bliss-Leavitt and Whitehead torpedoes within and throughout the United States and for the use of the United States Government; and that the only known or existing torpedoes are said Whitehead and Bliss-Leavitt torpedoes, or others substantially like them, and that no other torpedoes are adopted, purchased, made or used by the United States or any other government; that said torpedoes are propelled by stored compressed air or other gas, and it is only to torpedoes so propelled that superheaters are applicable; and that no other torpedoes containing superheaters are known in the art or sold to, or used by, the United States Government; and that the facts herein stated have been true at all times from the date of said instrument (Appendix A) down to the present; and that, accordingly, petitioner has solely and exclusively been entitled to, and had and enjoyed, as respects all torpedoes, the protection resulting from the grant of said several Letters Patent and each of them.

(h) That from the date of said written instrument (Appendix A), and during the entire period referred to in the present petition and up to the present time, all the terms, conditions and cove-

nants of said written instrument have been fully executed, observed and lived up to, and said instrument has at all times been and is now in full force and effect.

(i) That one consideration for the grant by said Armstrong Company to petitioner of the rights conferred by said instrument (Appendix A) was a concurrent grant by petitioner to said Armstrong Company of similar rights in foreign countries for the manufacture, sale and use of superheaters for torpedoes according to foreign patents corresponding to said Leavitt patents hereinbefore referred to.

6. That petitioner now is the owner as aforesaid of all the rights and privileges granted and secured or intended to be granted and secured in and by said Letters Patent, and has been such owner since the granting of said respective patents.

6a. That the main benefit and advantage of superheaters in torpedoes is due to the inventions of said Leavitt patents, which were pioneer or generic inventions which for the first time in the art enabled the energy stored in the compressed air to be increased before utilizing such air to propel the engine driving the torpedo; and that the improvements of said Sodeau patents above named were directed to the more convenient location of the superheaters and to details of construction concerning them, and said Sodeau inventions were in the nature of improvements carrying forward or extending the results of the pioneer inventions of said Leavitt patents and were not themselves pioneer or generic inventions.

7. That the said Frank M. Leavitt was the true, original and first inventor of the said invention

and improvements thereon patented in said Letters Patent Nos. 693,871 and 693,872; that the same were not known or used by others in this country before his invention or discovery thereof, and not patented or described in any printed publication in this or any foreign country before his invention or discovery thereof or more than two years prior to his application for said Letters Patent Nos. 693,871 and 693,872, or either of them, and had not been in public use or on sale in this country for more than two years prior to his said respective applications, and which had not been abandoned to the public, and for which no application for a patent in a foreign country had been filed by the said Frank M. Leavitt or his legal representatives or assigns more than seven months prior to the filing of said application for said patent No. 693,871 or said application for said patent No. 693,872.

8. That the said William H. Sodeau was the true, original and first inventor of the improvements on said superheater patented in said Letters Patent Nos. 827,891, 828,432, 835,262, 944,975, 964,574, 1,008,871 and 1,009,024; that the same were not known or used by others in this country before his respective invention or discovery thereof and not patented or described in any printed publication in this or any foreign country before his respective invention or discovery thereof or more than two years prior to his respective applications for said Letters Patent Nos. 827,891, 828,432, 835,262, 944,975, 964,574, 1,008,871 and 1,009,024, and which had not been in public use or on sale in this country for more than two years prior to his said respective applications and which had not been abandoned to the public, and for which no application for a patent in a foreign country had been filed

by the said William H. Sodeau or his legal representatives or assigns more than twelve months prior to the respective filing of the applications for said patents Nos. 827,891, 828,432, 835,262, 944,975, 964,574, 1,008,871 and 1,009,024.

8a. That the said William H. Sodeau and Edward W. Lloyd were the true, original and joint inventors of the improvements on said superheater patented in said Letters Patent No. 850,307; that the same was not known or used by others in this country before their said invention or discovery thereof and not patented or described in any printed publication in this or any foreign country before their said invention or discovery thereof, or more than two years prior to their application for said Letters Patent No. 850,307, and which have not been in public use or on sale in this country for more than two years prior to their said application and which had not been abandoned to the public, and for which no application for a patent in a foreign country had been filed by the said William H. Sodeau and Edward W. Lloyd, or their legal representatives or assigns, more than twelve months prior to the filing of the application for said patent No. 850,307.

9. (*a*) *That the defendant, through its Bureau of Ordnance of the Navy Department, has at all times recognized and acknowledged petitioner's ownership of the Bliss-Leavitt torpedo and of the inventions and patented improvements comprised therein, including the said superheater inventions, and has recognized the validity of petitioner's patents for said superheater and the ownership of said patents or exclusive rights thereunder by petitioner. Said Bliss-Leavitt torpedo was first offered by peti-*

tioner to defendant in or about September, 1903, was exhibited and demonstrated to a board of naval officers, who reported thereon to the Chief of Ordnance October 13, 1903, saying: "The superheater device gives great advantages in speed and range" and "The board also believes that the superheater may profitably be applied to the 5 meter torpedoes now in use on battleships to increase their range," and reporting favorably on other features of said torpedo, and said board recommended the purchase of two torpedoes; and accordingly, in that year defendant contracted with petitioner for the purchase of two such torpedoes, and in June, 1904, further contracted for the purchase of fifty of said torpedoes, and in March, 1905, contracted for the purchase of fifty more of said torpedoes, and in November, 1905, contracted for the purchase of 300 more of said torpedoes, all of which torpedoes were duly manufactured, delivered and paid for. Since that time the Bliss-Leavitt torpedo has been further improved and the defendant has repeatedly contracted with petitioner for the purchase of additional torpedoes, so that the aggregate of such torpedoes so contracted for by the defendant prior to the beginning of the present action had reached a total of 1,598 torpedoes. Each and all of said torpedoes included a superheater according to the inventions of said Leavitt patents, and the more recent of such torpedoes have included superheater improvements of said Sodeau patents, or some of them. Said Bliss-Leavitt torpedo has become the standard torpedo of the United States Navy.

(*b*) That on or about October 18, 1906, the defendant, through its Bureau of Ordnance of the Navy Department (*having at that time contracted for the purchase from petitioner of over 400 of said Bliss-Leavitt torpedoes containing said su-*

perheater inventions), in *a* written communication bearing said date, *stated that the Bureau was considering the manufacture of torpedoes, and did not desire to infringe any patent rights, and to avoid doing so* requested a list of petitioner's patents covering the Bliss-Leavitt torpedo and the amount of royalty which petitioner would charge defendant for *manufacturing thereunder.* That on or about November 24, 1906, petitioner furnished such list in writing, which included said *Leavitt* superheater patents *and British patent No. 35,003 of 1904; and on or about December 1, 1906, petitioner, in writing, proposed as a royalty for the manufacture of the entire Bliss-Leavitt torpedo the sum of $750 per torpedo.*

(*c*) That subsequently, and on or about June 14, 1907, defendant by telegraph requested permission of petitioner to purchase a limited number of torpedoes from Whitehead & Company, an English corporation, containing said superheater inventions. That petitioner on same day replied by telegraph that it desired to render every assistance to the Government on a proper business basis. That thereupon, and on or about June 17, 1907, the officers of petitioner conferred with Admiral Mason, Chief of the Bureau of Ordnance, at Washington, and it was agreed between them that the Government might purchase not more than 100 torpedoes from Whitehead & Company, *to contain said patented superheaters,* the amount of the royalty for the use therein of said superheater inventions to be later settled and agreed upon by the defendant and petitioner. *And thereupon, on June 17, 1907, petitioner sent its written consent to Whitehead & Company to sell to defendant 100 such torpedoes containing said superheaters. That it was understood and tacitly agreed between petitioner and the officers of de-*

fendant that the royalties to be paid petitioner should become due and payable when the torpedoes containing said superheaters should be brought within the United States and delivered to defendant, and be put into use by defendant under petitioner's patents therefor. That *then or* subsequently defendant *ordered* of Whitehead & Company, *and contracted with them for the manufacture and delivery,* pursuant to said agreement, *of* 50 torpedoes containing said superheater inventions, which *torpedoes* were, as petitioner is informed and believes, *delivered to defendant in a foreign country in sundry lots, each of which was paid for at such times of delivery, and each of which lots were* brought into the territory of the United States *and were delivered to defendant's torpedo station at Newport, R. I., all on the following dates, respectively, viz.:*

Torpedoes	*Delivered and Paid for*	*Imported into United States*	*Delivered at Newport*
5	*Dec. 18, 1907*	*Dec. 30, 1907*	*Jan. 6, 1908*
5	*Jan. 30, 1908*	*Feb. 10, 1908*	*Feb. 18, 1908*
5	*Feb. 15, 1908*	*Feb. 26, 1908*	*Mar. 2, 1908*
20	*June 27, 1908*	*July 7, 1908*	*July 9, 1908*
15	*July 15, 1908*	*July 25, 1908*	*Aug. 19, 1908*

and that none of the superheaters in said torpedoes so imported and received by the defendant were put into use under petitioner's patents until after June 1, 1908, and that all thereof were so put into use prior to the beginning of the present action.

(*d*) That on or about November 9, 1907, defendant, through its said Bureau of Ordnance, by letter bearing said date, stated, "The Bureau desires to take the subject of royalties under consideration for final settlement and requests that the

company will submit proposals covering the following points: * * * (b) Royalty to be paid by the Government for the manufacture of gyro and superheater for installation in Whitehead or other type of torpedo. (c) Price to be paid for superheaters and gyros manufactured by the E. W. Bliss Company and installed by the Government in Whitehead or other type of torpedoes." That thereupon petitioner replied by letter dated November 25, 1907, "Referring to your letter of November 9th, in regard to royalties on Bliss-Leavitt torpedo, and in confirmation of verbal proposition made by the officers of this company to you at Sag Harbor a few days ago, beg to state that we consider the following royalties and prices to be fair. * * * (3) Royalty to be paid by the Government for the manufacture of superheaters for installation in Whitehead or other type of torpedo, five hundred dollars ($500.00). (4) Price to be paid for superheaters manufactured by E. W. Bliss Company and installed by the Government in Whitehead or other type of torpedoes, six hundred fifty dollars ($650.00)."

(*e*) That defendant, through its said Bureau, by letter dated November 29, 1907, acknowledged receipt of said letter of November 25, 1907, and stated that the matter would be laid before the Torpedo Board at its meeting on December 3, 1907, and invited petitioner to attend. That petitioner, by its executive officers, attended said meeting and explained the reasonableness of said royalty to the members of the Torpedo Board.

(*f*) That thereafter, and on or about June 4, 1908, by contract bearing said date, the defendant agreed to pay petitioner six hundred fifty dollars

($650.00) each, for twenty superheaters containing said patented inventions and improvements, or some of them. *That defendant thereby to such extent accepted petitioner's proposal of November 25, 1907, and that it was well understood between petitioner and defendant that of such purchase price $500 was the royalty for use of said patents.* That said contract was duly performed and the price paid.

(*g*) That defendant, on or about December 12, 1910, by letter bearing said date, referred to the superheater royalty specified in petitioner's letter of November 25, 1907, and requested a reduction thereof. That petitioner replied by letter dated December 20, 1910, declining to reduce the amount of said royalty.

(*h*) That thereafter, and on or about April 18, 1911, by contract bearing said date, *the defendant agreed to pay petitioner $650 each for seventy-five* superheaters containing said patented inventions and improvements or some of them. *That defendant thereby again accepted petitioner's said proposal, it being understood that of such purchase price $500 was the royalty for use of said patents.* That said contract was duly performed and the contract price paid.

(*i*) That defendant, by letter dated April 27, 1911, requested additional superheaters to replace ones on which the royalty had already been paid, and requested that for this reason the price for these new superheaters be reduced. That, accordingly, on or about June 16, 1911, by contract bearing said date, petitioner agreed to supply 100 superheaters containing said patented inventions and improvements or some of them at two hundred dol-

lars ($200.00) each. *That said price was arrived at by deducting from the total price of $650 the royalty of $500, and adding an extra remuneration to petitioner of $50 for each superheater so contracted for.* That said contract was duly performed and the purchase price paid.

(*j*) That thereafter, and on or about March 13, 1912, by letter bearing said date, defendant repeated its request of December 20, 1910, for a reduction of the five hundred dollars ($500.00) royalty for superheaters. That petitioner by letter dated March 19, 1912, declined to grant any reduction and no reduction has ever been granted, and petitioner has never consented to *receive for* the use of said patented inventions or said patented improvements thereon or any of them by defendant *a less compensation than* said royalty of five hundred dollars ($500.00) each.

10. That in addition to the fifty torpedoes purchased by defendant from Whitehead & Company, as set forth in paragraph 9 (*c*) of this petition, defendant has purchased from the same company other torpedoes containing superheaters *according to the inventions of said Leavitt patents and containing some or all of the improvements of said Sodeau patents, and on information and belief petitioner avers that said purchases were as follows:*

130 torpedoes on or about July 7, 1908;
180 torpedoes on or about March 29, 1911; and
50 torpedoes on or about October 25, 1911;

that these allegations are made on information given petitioner by the Navy Department, and petitioner understands that the dates named are those

when contracts were entered into with said Whitehead & Company for the manufacture and the subsequent delivery to defendant of said torpedoes to the numbers stated; and that all of said torpedoes were manufactured and were, subsequent to such dates respectively, delivered to defendant, and that all were so delivered and put into use prior to May 2, 1913.

That, in addition, defendant has made since April 15, 1913, or is engaged in making, 100 superheaters in the United States which contain said patented *inventions* and said patented improvements thereon or some of them.

And that all of said purchases, so far as concerns the superheaters in or adapted to said Whitehead torpedo, and all of said manufacture of superheaters by defendant, have been with petitioner's consent and license and with the understanding and expectation by petitioner that petitioner should receive therefor its royalty for said superheaters as hereinbefore stated.

10a. That subsequently to April 10, 1905, and after the invention and development and practical introduction of said *outside* or Armstrong superheater, and prior to June 14, 1907, as petitioner is informed and believes, said Armstrong Company licensed said Whitehead & Company to use and exercise the inventions set forth in the patents recited in paragraph 5 of this petition under the corresponding Letters Patent of Great Britain for said inventions respectively, said license having been expressly subject to the rights of petitioner under said instrument of April 10, 1905 (Appendix A); and that subsequent to such license to said Whitehead & Company, and prior to June 14, 1907, and immediately preceding said latter date, said White-

head & Company (being then in privity with said Armstrong Company concerning the premises) informed the Bureau of Ordnance of the United States Navy Department that they (Whitehead & Company) were not at liberty to sell Whitehead torpedoes to the United States containing the so-called Armstrong superheater without the express permission of petitioner, and that such action by Whitehead & Company was taken because they knew that under said instrument (Appendix A) petitioner alone had the right to sell such superheaters to the United States; and that the Chief of the Bureau of Ordnance so informed petitioner on or about June 14, 1907, when (as stated in paragraph 9 of this petition) the defendant requested petitioner's permission to purchase torpedoes from said Whitehead & Company containing said superheater inventions, and that defendant requested such permission from petitioner because defendant well knew of such instrument (Appendix A) and that under its provisions petitioner alone had the right to sell such Armstrong superheaters to the United States.

11. That the fair and reasonable royalty for each of said superheaters is $500.00, which is also the stipulated and agreed royalty as above stated.

12. That petitioner on or about May 2, 1913, and at various other times, has demanded from defendant payment of said royalty of $500 for each of the 510 superheaters referred to in the preceding paragraphs of this petition, but defendant has wholly failed and neglected to pay any part thereof, and, by reason of the premises, the defendant is justly indebted to your petitioner in the sum of two hundred and fifty-five thousand dollars ($255,000), which sum is still due and unpaid.

13. That the petitioner is the sole owner of the claim set forth in this petition, no assignment or transfer of the said claim or of any interest therein having ever been made, and that petitioner is justly entitled to the amount herein claimed from the United States after allowing all just credits and offsets.

14. That no action upon your petitioner's claim has been had by or before Congress or any executive department of the Government, except that petitioner brought the subject of its claim to compensation for the use of said invention by the United States to the attention of the Secretary of the Navy by letter of May 2, 1913, and that thereafter your petitioner was informed by the Assistant Secretary of the Navy that the necessary proceedings for the consideration and adjustment of said claim should be instituted in this Honorable Court.

15. That petitioner is, as aforesaid, a domestic corporation, organized under the laws of West Virginia, and that petitioner has at all times borne true allegiance to the Government of the United States and has not in any way voluntarily aided, abetted or given encouragement to rebellion against the said Government; that neither petitioner nor any assignee of petitioner's has at any time brought or has now pending in any court any suit or process against any other person, firm or corporation acting or professing to act mediately or immediately under the authority of the United States for or in respect of the claim herein presented.

16. That the facts stated in this petition are true.

Whereupon your petitioner asks judgment in its favor against the United States for the said sum of $255,000.00.

The petitioner's address is Brooklyn, New York. The address of its attorney, Arthur C. Fraser, is 170 Broadway, New York, N. Y.

E. W. BLISS COMPANY,

By
(Signed) F. C. B. PAGE,
Vice-President.

ARTHUR C. FRASER,
Attorney for Claimant.

FRANK H. PLATT,
ARTHUR C. FRASER,
Of Counsel.

EASTERN DISTRICT OF NEW YORK,
CITY OF NEW YORK,
BOROUGH OF BROOKLYN, } ss.:

F. C. B. PAGE, being duly sworn according to law, says that he is the Vice-President of the E. W. Bliss Company, the petitioner named in the foregoing amended petition; that he has read the said petition and knows the contents thereof, and that the facts stated in the said petition are true to the best of his knowledge, information and belief.

(Signed) F. C. B. PAGE.

Sworn to and subscribed to before me this day of February, 1918.

MOSES ARONSON,
Notary Public #83,
Kings Co., N. Y.

(Notary's Seal)

APPENDIX A.

[N.B.—This appendix is printed in full following the first Amended Petition (filed March 28, 1917), pages 15-19.]

Appendix 7.

IN THE

COURT OF CLAIMS OF THE UNITED STATES.

E. W. BLISS COMPANY vs. THE UNITED STATES.	No. 32,838.

Motion for Leave to File Petition for Rehearing.

Now comes plaintiff, E. W. Bliss Company, and moves for leave of Court to file the accompanying petition for rehearing and printed brief in support thereof.

This motion is based upon plaintiff's "Second Amended Petition" submitted to the Court with a petition for leave to file the same on or about February 18, 1918.

It is based also on the grounds and reasons set forth in said petition for rehearing, and more fully set forth in the printed brief accompanying the same.

It is also based on the affidavit of Arthur C. Fraser annexed hereto.

NOTICE IS GIVEN to the defendant that the foregoing motion will be presented to the Court or a judge thereof on the

day of February, 1918, at o'clock in the or as soon thereafter as counsel can be heard.

E. W. BLISS COMPANY,
Plaintiff,
By its Attorney,
ARTHUR C. FRASER.

To the
ATTORNEY GENERAL,
Attorney for Defendant.

STATE OF NEW YORK,
CITY AND COUNTY OF NEW YORK, } ss.:

ARTHUR C. FRASER, being duly sworn, says:

I am of counsel for E. W. Bliss Company, plaintiff in this suit, and have had the active charge thereof in association with Frank H. Platt, Esq., as senior counsel.

I refer to my affidavit verified February 14, 1918, attached to the "Petition for Leave to File Second Amended Petition," and reaffirm the statements therein made.

The reasons why the petition for rehearing now presented was not filed within sixty days after December 3, 1917, are as stated in my said affidavit. I further state that the principal and most important matter decided by the Court in its opinion filed December 3, 1917, and its order of that date, namely, the question as to whether plaintiff's petition states a cause of action *ex contractu*, constituted that part of the present case which had been especially dealt with by said Frank H Platt, who

prepared the brief dealing therewith, filed on or about October 23, 1916, and who personally attended before the Court and made argument thereon on November 21, 1916. For this reason, upon receiving the Court's opinion of December 3, 1917, I at once forwarded it to Mr. Platt and asked him to take the matter up and to advise me if he desired a personal conference with me. I expected that he would deal with this aspect of the case with or without such conference. I was closely occupied during the last half of December and all of January with other pressing legal matters, especially certain urgent suits, and assumed that this case was receiving the attention of Mr. Platt. Toward the end of January I telephoned his office to see what progress was being made, and was then informed that he had been confined to his residence with a serious illness for some weeks, and on further inquiry learned that he had been unable to take up this case. Accordingly, I took it up myself immediately and proceeded to study the entire case and to determine alone what course should be taken, and to prepare the necessary papers. As before stated, I did not learn until January 29 that an order had been entered on December 3, 1917, limiting the time for filing an amended petition; I did not then understand that there was any fixed limit of time within which to present a petition or motion for rehearing. Although I examined the rules of Court, I found only Rule 61 limiting the time for similar motions, but this rule is limited to "A motion for a new trial" and follows Rules 85-88 concerning trials, and I construed and understood it as relating to motions for new trials upon the merits after final hearing upon evidence and argument, and as being limited to such action of the Court as

results in the final judgment. Even had I understood the rule as covering the case of an interlocutory order, such as that of December 3, 1917, it would have been impossible for me to have prepared the papers and presented such motion for rehearing within sixty days from the filing of said order, and in any event it would have been practically impossible to have performed the thorough investigations of fact and law which I have made in this case, and to have prepared the several papers submitted in any shorter time than was actually taken. I further state that, to the best of my information and belief, the delay has not in any way prejudiced the defendant or the Attorney General, and that, in my opinion, the consideration by the Court of the petition for rehearing and brief thereon is essential in order that justice may be done in this case.

ARTHUR C. FRASER.

Subscribed and sworn to before me this 18th day of February, 1918.

T. F. WALLACE,
(Seal) Notary Public (19),
New York County, N. Y.,
N. Y. County Register's No. 9006

[Submitted February 19, 1918; filed June 3, 1918.]

Appendix 8.

IN THE

COURT OF CLAIMS OF THE UNITED STATES.

E. W. BLISS COMPANY vs. THE UNITED STATES.	No. 32,838.

Petition for Rehearing.

Now comes the plaintiff, E. W. Bliss Company, and petitions the Court for a rehearing and reargument upon defendant's demurrer and motion to strike out, upon which the opinion and order of the Court dated December 3, 1917, were based; and for a reversal of the holding in said opinion and order. The present petition is in part based upon the second amended petition of plaintiff filed on or about February 15, 1918, which makes a fuller and more complete showing of facts.

In support of this petition the following grounds are presented:

1. The Court, in said opinion, reaches the conclusion that plaintiff's petition (except perhaps as to the first 50 Whitehead torpedoes containing superheaters) is not based upon contract, express or implied. This conclusion is apparently based upon the understanding or inference that the Government did not recognize plaintiff's patents or plaintiff's title thereto, but proceeded to adopt and use the superheater invention in torpedoes without

asking plaintiff's permission and in tortious defiance of plaintiff's patents and plaintiff's rights thereunder. It is submitted that this conclusion is unwarranted from the facts averred in plaintiff's first amended petition, namely, that the Government has for many years purchased the Bliss-Leavitt torpedoes from the petitioner (paragraph 2); that the defendant requested a list of petitioner's patents covering the Bliss-Leavitt torpedo, and the amount of royalty which petitioner would charge defendant for the use thereof, and that petitioner furnished such list, which included said superheater patents; and that subsequently defendant requested permission from petitioner to purchase a limited number of Whitehead torpedoes containing said superheater inventions; and that petitioner granted said request and agreed with the defendant that the Government might purchase not more than 100 such torpedoes from Whitehead & Comapny, "the amount of the royalty for the use therein of said superheater inventions to be later settled and agreed upon by the defendant and petitioner"; and that subsequently defendant, pursuant to said agreement, bought 50 such torpedoes from Whitehead & Company; and that subsequently defendant again asked petitioner to submit proposals covering royalties under the plaintiff's patents for superheaters for installation in Whitehead or other type of torpedo, and that petitioner thereupon proposed certain royalties therefor, namely, a royalty of $500 for such superheaters, and offered to manufacture the superheaters for the Government for $650 (an amount which inferentially included said royalty of $500); that petitioner by invitation appeared before a board and explained the reasonableness of said royalty; that thereafter the Government on two occasions purchased super-

heaters at $650 each (thereby inferentially accepting petitioner's proposal and acquiescing in the reasonableness of said $500 royalty); and then, on another occasion, defendant asked petitioner to supply certain superheaters to replace ones on which the royalties had already been paid (thereby again inferentially acknowledging petitioner's right to such royalty), and accordingly petitioner supplied these additional superheaters at a reduced price of $200 each; subsequently defendant asked plaintiff to reduce said $500 royalty for superheaters (thereby inferentially admitting plaintiff's right to a royalty therefor and disputing only the amount of such royalty), but plaintiff declined to reduce such royalty and has never consented to any reduction thereof (Petition, paragraph 9). A further support for plaintiff's contention that its transactions with the defendant constituted a contract is found in the allegations contained in paragraph 10a of the amended petition. Plaintiff respectfully submits that in these successive transactions the Government uniformly evinced a desire and intention to use said superheater inventions in Whitehead or other torpedoes with plaintiff's consent, and under license from plaintiff, and not in tortious defiance of plaintiff's rights. The only points in the series of transactions at which it can be said that the minds of the parties did not meet, occurred when the amount of royalty for the use of superheaters in the first torpedoes purchased from Whitehead & Company was unagreed upon and left for later determination, and when the Government subsequently asked plaintiff to reduce the royalty of $500, which plaintiff refused to do; at other times, and intervening these two occasions, the Government repeatedly acquiesced in plaintiff's right to royalty, and in the fixing of said royalty

at $500 per superheater, by reason of its successive purchases of superheaters with royalty included at $650, and of superheaters to replace those on which the royalty had been paid, at $200 each (said amount of $200 being equal to the originally proposed price of $650, less the $500 royalty and plus an increased price to plaintiff of $50 each). It was not until long after the agreement or meeting of minds involved in these recited transactions that the Government, through the Secretary of the Navy, refused to acknowledge and pay plaintiff's claim, and referred plaintiff to this Court (paragraph 14 of Petition). Such action could not abrogate or rescind the license contract previously entered into, and justifies no other inference than that the Navy Department had no appropriation out of which it could lawfully pay plaintiff's claim.

Plaintiff therefore submits that the facts set forth in the petition bring this case into that class wherein the Supreme Court of the United States has held that the facts justified the implication of a contract to pay for an agreed and permitted use of a patented invention, namely:

> *Palmer* v. *United States*, 128 U. S., 662;
> *United States* v. *Burdan*, 156 U. S., 552;
> *Societe Cail* v. *United States*, 224 U. S., 309;

and that the facts pleaded bring this case within the broader ground set forth in the following decisions, wherein the Supreme Court of the United States found that the Government, in taking private property for public use, is deemed to have done so with intent to make just remuneration therefor, and not as a tortious taking of property

in disregard of the rights of the owners thereof, viz.:

United States v. *Great Falls,* 112 U. S., 645, 656.
Hollister v. *Benedict,* 113 U. S., 59.
United States v. *Lynah,* 188 U. S., 445.

2. Said opinion of the Court, in discussing plaintiff's title to the Sodeau patents, holds that plaintiff has not such legal title thereto as would support an action for infringement, and that, therefore, the present action by plaintiff cannot be sustained under the Act of June 25, 1910, 36 Stat., 851. But, in fact, plaintiff has not claimed under the Act of 1910, but has based its claim primarily and chiefly upon the allegation that plaintiff entered into a contract, express or implied, with the defendant (although plaintiff has not intended that its petition should exclude relief on the ground of infringement, so far as concerns matters occurring since June 25, 1910, if on the trial the Court should find that plaintiff's allegations as to a contract were not borne out by the evidence). The Court has therefore failed to pass upon plaintiff's contention that its title or grant of rights from the Armstrong Company under the Sodeau patents is ample to sustain the present action upon the theory of contract.

3. Said opinion of the Court has discussed only the so-called Sodeau or Armstrong patents and the effect and extent of plaintiff's title thereto; and has not considered the Leavitt patents, as to which plaintiff has unquestionable legal title. The importance of an omission of consideration of the Leavitt patents is apparent from the allegation in the original petition that the Sodeau patents "are subservi-

ent to said patents Nos. 693,871 and 693,872 (being the Leavitt patents) and could not be used in torpedoes without employing the invention covered by said last-named patents"; and further, from the following allegation in paragraph 6-a of the second amended petition, viz.:

> "6-a. That the main benefit and advantage of superheaters in torpedoes is due to the inventions of said Leavitt patents, which were pioneer or generic inventions which for the first time in the art enabled the energy stored in the compressed air to be increased before utilizing such air to propel the engine driving the torpedo; and that the improvements of said Sodeau patents above named were directed to the more convenient location of the superheaters and to details of construction concerning them, and said Sodeau inventions were in the nature of improvements carrying forward or extending the results of the pioneer inventions of said Leavitt patents and were not themselves pioneer or generic inventions";

from which it appears that plaintiff's claim rests mainly upon the Leavitt patents for the generic invention, and not upon the Sodeau patents for the specific improvements.

The Court in said order directs that "no evidence is allowed to be taken in this case" concerning petitioner's claim for 460 superheaters (being all except the 50 superheaters set forth in paragraph 9 of the amended petition); but it is submitted that, even if it were found that petitioner was unable to prove its allegations as to contract, petitioner would, in any event, be entitled to prove acts of infringement by the defendant under the Act of June 25, 1910, 36 Stat., 851. Accordingly, petitioner is entitled (under any theory) to offer evi-

dence at least concerning purchases and use of the patented superheaters by the defendant subsequent to the date of said Act. Accordingly petitioner prays a modification of said order to enable plaintiff to prove all superheaters made, acquired or used by defendant which come under the said Leavitt patents.

Dated February 18, 1918.

E. W. BLISS COMPANY,
By its Attorney,
ARTHUR C. FRASER.

I hereby certify that the foregoing petition for rehearing is, in my opinion, well founded in point of law, and is not interposed for purposes of delay.

ARTHUR C. FRASER,
Of Counsel.

[Submitted February 19, 1918; filing denied.]

Appendix 9.

IN THE

COURT OF CLAIMS OF THE UNITED STATES.

E. W. BLISS COMPANY vs. THE UNITED STATES.	No. 32,838.

Assignment of Errors.

The plaintiff-appellant, E. W. Bliss Company, presents with its accompanying application for appeal the following assignment of errors.

1. The Court erred in holding and deciding that plaintiff's petition does not set forth a cause of action *ex contractu*.

2. The Court erred in holding and deciding that plaintiff's petition does not set forth a cause of action *ex contractu* except as to superheaters in the first 50 torpedoes referred to in paragraph 9.

3. The Court erred in holding and deciding that as to such 50 torpedoes plaintiff's claim is not so set forth in its petition as to negative the bar of the Statute of Limitations.

4. The Court erred in holding and deciding that as to the remaining 460 superheaters set forth in plaintiff's petition, such petition sets forth no cause of action, and in refusing to allow plaintiff to take evidence in support of its claim for compensation therefor.

5. The Court erred in holding and deciding that plaintiff's petition as amended does not set forth such title to the patents claimed under as will support plaintiff's claim to recover compensation for the purchase and use by defendant of torpedoes or superheaters therefor, containing the patented inventions.

6. The Court erred in holding and deciding that plaintiff's petition does not set forth legal title in plaintiff to the Leavitt patents recited in paragraph 4.

7. The Court erred in holding and deciding that plaintiff's petition as amended does not set forth such title or rights in plaintiff to or under the Armstrong Company's patents recited in paragraph 5, sub-paragraphs (*a*) to (*h*) inclusive, as enabled plaintiff to enter into an agreement with defendant for the purchase and use by defendant of torpedoes or superheaters containing the patented inventions, and entitled plaintiff to recover compensation for such use.

8. The Court erred in denying plaintiff's petition to file the second amended petition.

9. The Court erred in denying plaintiff permission to file so much of said second amended petition as was within the authorization to amend contained in the Court's order of December 3, 1917, namely, the amendments to paragraph 9 contained in sub-paragraph (*c*).

10. The Court erred in holding that plaintiff was in default in failing to amend its petition as required in the Court's order of December 3, 1917, within the time (January 15, 1918) limited in said order, in view of the showing that neither plain-

51

tiff's attorney nor counsel had been served with said order or otherwise notified thereof, and the plaintiff and its counsel had no knowledge of the time limit in said order until after said time had expired.

11. The Court erred in refusing to excuse the alleged default of plaintiff in failing to so amend its petition within the time (January 15, 1918) limited in said order of December 3, 1917, in view of the showing on plaintiff's motion that plaintiff's attorney of record was then mortally ill and died five days after the entry of said order, that plaintiff's other counsel were remote from the Court, and its senior counsel was immediately afterward incapacitated by serious illness from attending to any business, and the remaining counsel did not learn of the entry of said order, or of said time limit, until after said time had expired, and although preoccupied with other court engagements, diligently proceeded to procure information and prepare such second amended petition and a petition for leave to file the same, and a brief thereon, and other papers, and filed all such papers February 18, 1918.

12. The Court erred in denying plaintiff's petition for rehearing in the face of the showing in such petition that the Court had erred in matter of law, in holding that plaintiff's petition did not, except as to the first 50 torpedoes or superheaters therefor set forth therein, set forth a cause of action *ex contractu*.

13. The Court erred in dismissing plaintiff's petition.

14. The Court erred in dismissing plaintiff's petition *in toto* under Rule 18 of the Rules of the Court

of Claims, when the alleged uncertainty as to when its claim first accrued applied to only 50 torpedoes, and the petition was free from uncertainty as to the remaining 460 torpedoes or superheaters therefor, on which plaintiff's petition is based.

15. The Court erred in dismissing plaintiff's petition as to 330 torpedoes or superheaters therefor as to which said petition avers that defendant purchased or has made the same at dates since June 25, 1910, and as to which plaintiff has a cause of action for infringement under the Act of June 25, 1910 (36 Statutes, 851).

WHEREFORE plaintiff-appellant prays that the order of the Court of Claims dismissing plaintiff's petition may be reversed and remanded with direction to the Court of Claims to accept and file plaintiff's second amended petition and to proceed with the trial of this suit thereon.

Dated, September 4, 1918.

E. W. BLISS COMPANY,
Plaintiff-Appellant,
By its Attorney,
ARTHUR C. FRASER.

BRIEF

In Support of the Foregoing Petition.

The record as certified by the Court of Claims is deficient in that it omits certain papers and proceedings necessary to enable appellant to bring into issue on this appeal the points set forth in several of the assignments of error.

Statement.

The original petition (Appendix 1, p. 6) set forth the ownership by plaintiff of patents for a "superheater" used in automobile torpedoes, viz., two patents to Leavitt, granted in February, 1902; also the issue of subservient patents for certain improvements to Armstrong, Whitworth & Co. for inventions of one Sodeau, which patents, issued in 1906 to 1911 inclusive, "could not be used in torpedoes without employing the invention covered by said" Leavitt patents; that by a written instrument ap- plaintiff acquired certain sole, full and exclusive rights thereunder. And after formal recitations as to inventorship, etc., it averred:

That in 1906 the Bureau of Ordnance of the Navy Department asked what royalty the plaintiff would charge defendant for the use of these patents, and plaintiff proposed certain royalties; that in 1907 plaintiff agreed with the defendant that it might purchase certain Whitehead torpedoes containing the patented inventions, the royalty to be settled later, and the defendant did purchase 50 torpedoes accordingly; that in 1907 plaintiff proposed a royalty of $500 for superheater inventions, or would supply the superheaters for $650, and in 1908 defendant purchased superheaters at such price of $650, and again in 1911 it made further purchases:

that defendant repeatedly asked plaintiff to reduce this royalty below $500, but plaintiff always declined. That defendant has since purchased other torpedoes containing the superheater inventions, namely: 130 in July, 1908; 180 in March, 1911; 50 in October, 1911, and has made 100 superheaters since April, 1913, making a total of 510 superheaters.

That the fair and reasonable royalty for said superheaters is $500, which is also the agreed royalty. That said royalties have been demanded, but never paid, and other formal averments.

Defendant moved (Appendix 2, p. 17) to dismiss this petition on the grounds that the facts stated showed neither expressed nor implied contract to pay the royalties demanded.

On this motion (in effect a demurrer) briefs were filed, and an argument was had, and the Court dismissed the motion. No opinion was filed, but from expressions of the Judges during the argument it was clear that they regarded the petition as setting up a case of contract, either express or implied, to pay royalties for the use of plaintiff's inventions. As the motion (or demurrer) was directed to the sole question as to whether the petition pleaded a cause of action in contract, of which alone the Court had jurisdiction (since the first portions of the cause of action arose prior to the Act of June 25, 1910), the Court's action admitted of no other interpretation than that the pleading set forth a cause of action *ex contractu*. Thenceforth, the plaintiff's counsel regarded this as the settled law of the case in the Court of Claims.

Defendant next moved (Appendix 3, p. 18) to strike out paragraphs 5, 6, 8 and 8*a* from plaintiff's petition. This motion applied solely to the Sodeau patents and was on the ground that plaintiff had

not legal title thereto, but was only a licensee, and as such had no right to maintain this suit. Briefs were filed and oral argument had on December 13, 1916, and the Court ordered plaintiff to file a copy of the written instrument under which it claimed title to the Sodeau patents, with leave to amend its petition (Certified Record, p. 1).

Thereupon plaintiff filed its Amended Petition with said instrument as "Appendix A" (see Certified Record under II). But without comparing the Amended Petition with the original Petition (Appendix 1) it is not apparent what amendments were made, nor what was the form of plaintiff's claim at the time when the Court dismissed the original motion (demurrer), thereby sustaining plaintiff's cause of action *ex contractu*.

On April 7, 1917, defendant filed a demurrer and motion to strike out (Appendix 4, p. 20), directed solely to those paragraphs of plaintiff's petition avering the Sodeau patents and plaintiff's title thereto, the sole ground of demurrer being a denial of plaintiff's title to said patents and of its right to sue thereon.

This demurrer and motion (Appendix 4) is not given in the official record. Without this it might be inferred that the demurrer ran to the entire pleading.

After filing briefs the motion was argued May 23, 1917, whereupon the Court, instead of deciding the questions at issue, entered the order of May 28, 1917 (see IV, Certified Record).

This order led defendant to file a new and more comprehensive demurrer (see Certified Record under V). This demurrer includes the following ground, which went back and reasserted the ground on which defendant's first motion to dismiss (or demurrer) was based, viz.:

> "1. That the facts and things alleged in said petition do not make or constitute any cause of action against defendant, nor any cause of action of which this court has jurisdiction."

Defendant appended to this demurrer a memorandum brief, saying, *inter alia:*

> Defendant submits that the filing of the amended petition is a commencement of the suit *de novo*. It, therefore, demurs, first, to the amended petition as a whole on the ground that the Court is without jurisdiction, because no contract can be implied as to the 510 torpedoes (par. 10, Petition), for which recovery of royalties is sought. The suit is wholly upon an alleged *implied* contract, and no infringement is charged. Defendant submits that the things alleged (par. 9) do not constitute a "meeting of minds," nor show any implied contractual relation as to any of the 510 torpedoes complained of.

As the case had been three times argued orally, and several briefs already filed, discussing all questions at issue, the counsel agreed to submit this demurrer on the briefs without further argument (see Verification, *supra*, p. 5).

December 3, 1917, the Court filed an Opinion (Certified Record under VII), holding, in substance (briefly stated): (1) that except as to 50 superheaters, the purchase of which from Whitehead was authorized in June, 1907, there was no showing of a cause of action *ex contractu;* (2) that as to the Sodeau patents plaintiff had not sufficient title to sustain the action (but not mentioning the prior and broader Leavitt patents as to which plaintiff's

assertion of title was unquestionable); (3) that as to such 50 superheaters, the dates of purchase were not stated with sufficient definiteness to establish that they were not within the bar of the Statute of Limitations, and plaintiff was directed to amend the petition in this respect; and (4) that as to the remaining 460 torpedoes, the demurrer was sustained. The same day an order was entered (see Certified Record under VIII) to like effect, requiring plaintiff to amend by January 15, 1918.

The Court thus (except as to 50 torpedoes) reversed its holding of December 4, 1916, overruling the original motion to dismiss (demurrer). This reversal was on the same briefs and without additional argument.

At this time plaintiff was represented by:

L. S. Bacon, local attorney, Washington;
Frank H. Platt, of counsel, New York;
Arthur C. Fraser, of counsel, New York.

On December 3, 1917, Mr. Bacon was lying mortally ill with pneumonia, from which he died on December 6, 1917. Because of his illness and death the channel through which the New York counsel had information of the doings of the Court was closed. Mr. Fraser learned of Mr. Bacon's death several days thereafter and thereupon caused an inquiry to be made at the Clerk's office to see if any decision had been rendered and received printed copies of the decision of December 3, 1917, but no copy of any order (Affidavit, *supra*, p. 23). He at once sent a copy of the opinion to Mr. Platt and requested a conference with him, but learned shortly afterward that Mr. Platt was confined to his home by a serious illness which ever since that time incapacitated him from conducting legal business (*supra*, p. 23). Mr. Fraser accordingly (un-

der the circumstances stated, *supra,* pp. 13-24 and 46-48) took up the preparation of an amended petition and a petition for rehearing.

He presented February 18, 1918, a power of attorney and motion that he be substituted in place of Mr. Bacon, which was allowed by the Court June 3, 1918.

On February 18, 1918, he presented a Second Amended Petition (see Appendix 6, p. 25) and a motion for leave to file such second amended petition (see Appendix 7, p. 45).

On February 19, 1918, he presented a Petition for Rehearing (see Appendix 8, p. 49) and filed a motion for leave to file such petition for rehearing (see Appendix 7, p. 45).

The Court took no action on these proceedings until June 17, 1918, when it denied both motions and entered final judgment against plaintiff on the ground that it was in default for non-compliance with the order of December 3, 1917 (see Certified Record under X).

All the circumstances concerning the alleged default are stated in Mr. Fraser's affidavits (*supra*, pp. 22-24 and 46-48).

Argument.

The following reasons are submitted why the several papers omitted from the Certified Record and named in the foregoing Petition for Certiorari should be included in the Record on appeal:

1. The original Petition (Appendix 1, p. 6), or so much thereof as differs from the Amended Petition, should be included in order that the effect of the decision of the Court of Claims of December 4, 1916, may be seen. The original Petition is identical

with the Amended Petition in every respect except as to the allegations concerning plaintiff's title to the Sodeau patents. There are thus presented two distinct questions for this Court on appeal, viz.: (1) as to whether plaintiff's pleading sets forth a cause of action *ex contractu*, and as to this the original Petition and Amended Petition are the same: (2) as to whether plaintiff has title to the Sodeau patents. As to this the Amended Petition is different, and is alone sufficient.

2. Defendant's Motion to Dismiss (Appendix 2, p. 17) should be included in the Record, because without it the decision of the Court of Claims of December 4, 1916, overruling this Motion, is not apparent.

It is submitted that appellant is entitled to the benefit of showing to this Court that on a pleading unchanged in so far as affects this question the Court of Claims decided, in December, 1916, that plaintiff set forth a cause of action *ex contractu*, and that, in December, 1917, said Court decided to the precise contrary.

3. Defendant's Motion to Strike Out (Appendix 3, p. 18) should be included in the Record in order that appellant may show that defendant apparently acquiesced in the ruling of the Court of December 4, 1916, and the Motion and argument thereon went solely to questions concerning plaintiff's title to the Sodeau patents.

4. Defendant's Demurrer and Motion (Appendix 4, p. 20) should be included in the Record in order that appellant may show that after the filing of plaintiff's Amended Petition the defendant still limited its Motion to an attack upon plaintiff's title to the Sodeau patents. Without this paper in the

Record it does not appear what issues were argued May 23, 1917, nor on what the Court's Order of May 28, 1917 (Certified Record under IV), was based.

With these papers in the Record it will become apparent that defendant, in its substituted Demurrer (Certified Record under V), broadened the issue to bring up again the question of a cause of action *ex contractu* which had been decided in plaintiff's favor December 4, 1916.

5. The Motion for leave to file the Second Amended Petition (Appendix 5, p. 21) should be included in the Record in order to show what plaintiff did in view of the Court's decision of December 3, 1917, and because of the technical default in which plaintiff was placed by its not having complied with the Court's Order of that date to amend its Petition by January 15, 1918. The Court's judgment (Certified Record, X) is based upon "the plaintiff not having complied with the Order of the Court of December 3, 1917, to make the Petition more specific," etc. That this Order was never served upon or otherwise brought to the attention of plaintiff's attorneys is shown by the verification attached to this Motion (Affidavit, *supra*, pp. 22-24). Hence the default was wholly technical. The tenth assignment of error (*supra*, p. 57) avers that the Court erred in finding plaintiff in default, and the eleventh assignment, that the Court erred in refusing to excuse such default under the circumstances.

6. The Second Amended Petition (Appendix 6, p. 25) should be included in the Record, because without it this Court cannot pass upon assignments of error 8 and 9. The new matter in this Second Amended Petition is printed in italics so that its differences from the first Amended Petition may be

easily seen. The amendments thus made are two-fold: (1) those intended to comply with the Court's Order of December 3, 1917, these being the amendments made to paragraph 9, contained in sub-paragraph *c*; (2) the introduction of a more complete statement of the transactions between the plaintiff and the Government, whereby to show more in detail than the original or first Amended Petition that the transactions were essentially contractual and excluded the theory of tort.

Although the third assignment of error questions the Court's holding as to the first 50 superheaters not being so set forth as to be within the Statute of Limitations, it is submitted that appellant should not be confined to this issue on appeal in view of its *bona fide* effort to comply with the requirement of the Court (after it learned of such requirement) by amending its Petition so as to make a more definite statement of the facts. Under the ninth assignment of error the Court should, we contend, have admitted this portion of the Second Amended Petition.

7. Plaintiff's Motion for leave to file the Petition for Rehearing (Appendix 7, p. 45) should be included in the Record in order to show why the Petition for Rehearing was not earlier presented (Affidavit, pp. 26-28). The Court refused to receive the Petition for Rehearing without this Motion on the ground that it was not brought within the time fixed by Rule 90, viz.:

> "Motions for new trial, except as provided by section 1088 of the Revised Statutes (sec. 175 of the judicial code) shall be filed within sixty days from the time the judgment of the court is announced,"

and hence a motion for leave to present the Petition for Rehearing became necessary. Appellant proposes to argue that the Petition for Rehearing was presented in ample and reasonable time; that Rule 90 does not apply to such Petition because it is limited to a motion for a new trial made after final judgment and has no reference to a ruling on an interlocutory proceeding, as in this case, where no final judgment had been entered.

Appellant, however, cannot argue these points without having this motion in the record.

8. The Petition for Rehearing (Appendix 8, p. 49) should be included in the Record in order to enable appellant to argue the twelfth assignment of error, namely, that the Court erred in denying the rehearing in the face of the showing that it had erred in matter of law in holding that plaintiff's Petition did not set forth (except as to the first 50 torpedoes) a cause of action *ex contractu*.

The nature of the showing as to the error of the Court on this question of law, contained in the Petition for Rehearing, cannot be made manifest without the inclusion of the Petition for Rehearing in full in the Record.

Finally, it is submitttd that appellant, in asking a review by this Court of the rulings of the Court of Claims as to matters which ordinarily come within the discretion of the Court, is justified by reason of the arbitrary character of the rulings of the Court of Claims in asking the Supreme Court to review such rulings on the ground that the Court of Claims therein committed abuses of discretion.

The technical default that the Court of Claims insisted on enforcing is one which it should have excused in view of the showing made in the affidavits of plaintiff's attorney. The fact that no actual notice of the Court's Order of December 3, 1917, ever

reached plaintiff's attorneys until after the default had occurred should of itself have induced the Court to reopen the matter and grant additional time for compliance with such Order. It seems that it is the practice of the Court of Claims to expect attorneys to acquaint themselves with the orders entered by applying at the Clerk's office; but nothing to this effect is contained in the Rules of the Court of Claims, and attorneys in New York are not charged with notice of any such custom. Had it not been for the death of Mr. Bacon immediately after the entry of this Order he (being a Washington attorney, practising before the Court of Claims, and presumably familiar with its custom) would doubtless have learned of the Order and communicated it to the New York attorneys. Under the circumstances of his death, and the absence of the remaining attorneys, and the absence of any actual notice to them, and of the reasonable promptness with which action was taken on plaintiff's behalf when notice was received, it is submitted that the Record should be made to contain a sufficiently full copy of all proceedings to enable appellant to maintain its argument before the Supreme Court that the Court of Claims committed an abuse of discretion in enforcing such technical default, and in refusing to permit the filing of the Second Amended Petition (which would have removed all basis for the decision adverse to plaintiff in the Court's opinion of December 3, 1917), and in refusing to entertain the Petition for Rehearing with the showing that the Court had erred on an essential question of law.

ARTHUR C. FRASER,
Attorney for Appellant.

New York, December 14, 1918.

Counsel for Parties.

E. W. BLISS COMPANY *v.* UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

No. 240. Argued March 12, 15, 1920.—Decided May 17, 1920.

Petitioner averred that it granted the Government's request for permission to purchase from another certain torpedoes containing a device in which the petitioner claimed patent rights, upon a royalty the amount of which was "to be later settled," and that the Government purchased; but it also alleged that negotiations to settle the amount to be paid failed and that petitioner never consented to the use of the patented invention without payment of an amount of royalty which the Government refused to pay. *Held*, that no express or implied contract to pay any royalty, cognizable by the Court of Claims under Jud. Code, § 145, could be derived from the facts stated. P. 189.

To maintain an infringement suit against the United States under the Act of June 25, 1910, the claimant must have at least such an interest in the patent as independently of that act would support a suit against a defendant other than the United States. P. 191.

A grant by a prospective patentee of the "sole and exclusive license" to use the invention for the full term of patents to be procured, on designated articles, only when sold to the United States, the grantee undertaking to pay a royalty on each such article fitted with the invention and the grantor at its own cost to procure patent and to defend "the license to use . . . hereby granted" against infringers, is a mere license and will not sustain a suit for infringement. P. 192.

53 Ct. Clms. 47, affirmed.

THE case is stated in the opinion.

Mr. Arthur C. Fraser, with whom *Mr. Frank H. Platt* was on the brief, for appellant.

Mr. Assistant Attorney General Davis, and *Mr. Daniel L. Morris*, Special Assistant to the Attorney General, with whom *Mr. Edward G. Curtis*, Special Assistant to the Attorney General, was on the brief, for the United States.

MR. JUSTICE CLARKE delivered the opinion of the court.

In this suit compensation is sought from the Government for the use which it made of a patented "superheater," in connection with Whitehead torpedoes.

A "superheater" is a device in which fuel is burned in the compressed air which drives the motor by which a torpedo is propelled through the water, so that the air is heated to such a degree that its energy is greatly increased, with the result that the range of the use of the torpedo is much extended.

The Court of Claims interpreted the petition as containing a claim that the defendant had contracted to pay appellant for fifty "superheaters" at $500 each, and also as claiming that it had infringed rights of the appellant in certain United States Patents by the purchase of 360 "superheaters" from Whitehead & Company, a British corporation, and by itself manufacturing one hundred such "superheaters." Concluding as to the first claim that the petition did not state a cause of action in contract, and, as to the second, that it did not show title to the patents involved sufficient to support infringement, a demurrer to the petition was sustained and the suit dismissed.

The main contention in this court is that a cause of action in contract is stated with respect to all of the 510 "superheaters," but in the alternative, though faintly, it is claimed that the allegations also make out a case of infringement.

The appellant alleges that it was the owner of two United States Patents issued in 1902, covering the "superheater" device and that in 1905 it entered into a written contract with the Armstrong Company, a British corporation, for the use of improvements in "superheaters" owned by that company and at the time protected in

Great Britain by a provisional specification for a patent. A copy of this contract, attached to the petition, after reciting that the Armstrong Company proposes to apply for a patent in the United States upon the improvements in "superheaters" which it owns, and that it is desirous of granting to the appellant the exclusive license to use such invention "in connection with the Bliss-Leavitt torpedo" manufactured by appellant, proceeds to grant to appellant the "sole and exclusive license" to use such inventions for the full term of the letters patent thereafter to be procured for the purpose of propelling Bliss-Leavitt torpedoes wherever sold by the Bliss Company and "Whitehead torpedoes sold only to the United States Government."

The contract provides for the payment by the appellant of a royalty of $25 for each torpedo fitted with the Armstrong inventions under penalty of cancellation, and that the Armstrong Company shall pay all costs and expenses of procuring the contemplated patents and of protecting them against infringement.

The petition alleges that eight United States patents on the "superheater" device were procured by the Armstrong Company, variously dated from August 7, 1906, to November 14, 1911, but no assignment of rights under them was made to appellant other than such as it derives from the contract of 1905, which, it avers, has been fully recognized and its terms complied with, by both of the parties to it.

The reference in the amended petition to the two patents owned by the appellant are so meager and so vague that we conclude that liability in contract or for infringement must be derived, if at all, from the allegations applicable to the contract of 1905.

As to the contract.

The allegations are: that prior to 1907 Armstrong & Co. licensed Whitehead & Co., a British corporation, to

"use and exercise" its superheater inventions patented in Great Britain and in the United States but subject to the rights of appellant under its contract of 1905; that in June, 1907, the appellant granted a request by the defendant for permission to purchase from Whitehead & Co. not more than one hundred torpedoes containing the "superheater" invention, the amount of royalty "to be later settled"; that subsequently 50 torpedoes so equipped were purchased and were brought into the United States subsequent to June 1, 1908; but that no royalty was ever paid to appellant for the use of the "superheaters" upon them.

If the petition had stopped here, there might be substance in the claim that as to these fifty torpedoes a contract for royalty on the basis of *quantum meruit* should be implied. But the petition goes on and alleges: that in November, 1907, before the alleged purchase of the 50 torpedoes, in a treaty between the parties as to the amount of royalty to be paid, a demand by the petitioner of $500 for each "superheater" installed in a Whitehead torpedo was refused by the Government; that in December, 1910, and again in March, 1912, long after the alleged purchase, the prior discussion as to royalty was renewed, but without agreement; and finally it is averred "that petitioner, by letter dated March 19, 1912, declined to grant any reduction and no reduction has ever been granted, and petitioner has never consented to the use of said patented inventions or of said patented improvements thereon or any of them by defendant without payment of said royalty of $500 each."

It is too clear for discussion that these allegations, taken together, not only do not show a contract of the parties, express or implied, to pay a royalty in any amount, but that they distinctly and in terms negative the making of any such contract as is necessary to give the Court of Claims jurisdiction under the applicable section of the

Judicial Code, § 145, and the decisions of this court. *Schillinger* v. *United States*, 155 U. S. 163; *United States* v. *Berdan Fire-Arms Manufacturing Co.*, 156 U. S. 552; *Russell* v. *United States*, 182 U. S. 516; *Bigby* v. *United States*, 188 U. S. 400; *Harley* v. *United States*, 198 U. S. 229, 304; *Juragua Iron Co.* v. *United States*, 212 U. S. 297, 309; *Farnham* v. *United States*, 240 U. S. 537, 540.

Treating for peace with one claiming patent rights for which it paid a royalty of $25, falls far short of a "convention between the parties—a coming together of the minds " to pay $500, or any other amount, for the use of the device.

As to the claim for infringement.

The contract of 1905, relied upon, in terms granted to the appellant the "sole and exclusive license " to use the Armstrong inventions for the terms of the patents thereafter to be procured in Great Britain and in the United States "for the purpose of propelling Bliss-Leavitt torpedoes " (with which we are not concerned) "wherever sold by the Bliss Company and Whitehead torpedoes sold only to the United States Government."

Authority to maintain a suit for infringement against the United States can be derived only from the Act of Congress of June 25, 1910, c. 423, 36 Stat. 851, which provides that the "owner" of an infringed patent may recover reasonable compensation in the Court of Claims, and reserves to the United States "all defenses, general or special, which might be pleaded by a defendant in an action for infringement, as set forth in Title Sixty of the Revised Statutes, or otherwise."

Giving to this statute, as we do, the liberal interpretation placed upon it in *Crozier* v. *Krupp*, 224 U. S. 290, and in *Cramp & Sons Co.* v. *International Curtis Marine Turbine Co.*, 246 U. S. 28, the "owner " who may maintain an infringement suit against the Government must have at least such an interest in the patent as without the

statute would support such a suit against a defendant other than the United States.

It has long been settled that a licensee may not maintain a suit for infringement, *Gayler* v. *Wilder*, 10 How. 477; *Littlefield* v. *Perry*, 21 Wall. 205; *Paper-Bag Cases*, 105 U. S. 766; *Pope Manufacturing Co.* v. *Gormully and Jeffery Manufacturing Co.* (No. 3), 144 U. S. 248; and that to entitle an assignee or grantee to maintain such a suit under warrant of Rev. Stats., § 4919, such assignee or grantee must have an assignment, grant or conveyance, either of the whole patent, of an undivided part of it, or of an exclusive right under it "within and throughout a specified part of the United States." Any assignment or transfer short of one of these is a mere license giving the licensee no interest in the patent sufficient to sue at law in his own name for infringement or in equity without joining the owner of the patent. *Waterman* v. *Mackenzie*, 138 U. S. 252, 255; *Pope Manufacturing Co.* v. *Gormully*, 144 U. S. 224.

While the legal effect of the terms used, and not the name applied to the instrument containing them, will determine whether a transfer is an assignment or a license, nevertheless the language used is often, as in this case, of great significance in determining what that legal effect shall be.

The right granted the appellant by the contract of 1905 is termed in it a "license"; the appellant contracts, as licensees usually do, to pay a royalty for each torpedo fitted with the devices to be patented; the contract does not purport to grant an interest in the patent or any exclusive territorial rights, but only, with respect to the Whitehead torpedo, rights as to a single prospective purchaser—the Government of the United States; and the Armstrong Company contracts at its own cost "to take all necessary proceedings for protecting and defending the license to use . . . hereby granted" against

infringers. Palpably this is a mere license, not sufficient to sustain a suit for infringement.

Several minor questions, including some of practice, are argued in the brief for appellant, but the opinion of the Court of Claims deals with them thoroughly and satisfactorily and its judgment is

Affirmed.